Supreme Court, U.S.
FILED

942 116 JUN 26 1995

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1994

Landscape Properties, Inc.
Debtor In Possession, *Petitioners*

v.

Robert A. Vogel and Joe D. Whisenhunt, *Respondents*

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

C. Richard Crockett*
R.J. Brown
Crockett & Brown PLLC
10809 Executive Center Drive
Little Rock, Arkansas 72211
(501) 221-2939
Attorneys for Petitioner
Landscape Properties, Inc.
*Counsel of Record

PARAGON PRINTING & STA., 311 East Capitol Avenue, Little Rock, AR 72202 (501) 375-1281

QUESTIONS PRESENTED

This Court should decide:

(i) Are there common law defenses to a violation of 11 U.S.C. 363(n)?

(ii) Does the common law doctrine of election of remedies apply to a suit under 11 U.S.C. 363(n)?

(iii) What are the roles of the court and jury in determining matters under 11 U.S.C. 363(n)?

LIST OF PARTIES

The parties to the proceeding below are:

(1) Petitioner, Landscape Properties, Inc., Debtor in Possession,

(2) Respondents Robert A. Vogel and Joe D. Whisenhunt, and

(3) Richard C. Downing, Esq., Milton T. Schaeffer and Wingfield Martin. Downing, Schaeffer and Martin were dismissed from the case before trial. Petitioner has a wholly owned subsidiary named Landscape Associates, Inc., which is an Arkansas Corporation. No court has certified that the constitutionality of an Act of Congress was drawn into question.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED 1

STATEMENT OF THE CASE 3

ARGUMENT FOR ALLOWANCE OF THE WRIT 5

COMMON LAW DEFENSES TO A VIOLATION OF 363(n). 7

COMMON LAW ELECTION OF REMEDIES AND 363(n) 10

THE ROLES OF COURT AND JURY UNDER 363(n) 12

CONCLUSION 16

APPENDIX 1A

TABLE OF AUTHORITIES

CASES Page

Anadarko Petroleum Co. v. Venable, 850 S.W.2d 302 (1993) 8
BFP v. Resolution Trust Corp., 511 U.S. ___, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994) 9, 11
Central Bk. v. First Interstate Bk., 511 U.S. ___, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994) 9
City of Chicago v. Environmental Defense Fund, 511 U.S. ___ , 114 S. Ct. 1588, 128 L. Ed. 2d 302 (1994) 7
Curtis v. Loether, 415 U.S. 189 (1974) 13
Elder v. Holloway, 510 U.S. ___ , 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994) 14
Falcon Jet Corp. v. King Enter., Inc. (In re King Enter.) 678 F.2d 73 (8th Cir. 1982) 10
Granfinancieara, S.A. v. Nordberg, 492 U.S. 33 (1989) 13
Grogan v. Garner, 806 F.2d 829 (8th Cir. 1986) 10
Gumport v. China Int'l Trust & Inv. Co. (In re Intermagnetics America, Inc.), 926 F.2d 912 (9th Cir. 1991) 8
Landscape Properties, Inc., D.I.P. v. Vogel, et al., 46 F.3d 1416 (1995) 5-9,12-15
Markman, et al. v. Westview Instruments, Inc., et al., No. 92-1049, Slip Op. at 18 (Fed. Cir. April 5, 1995) 14
Peek v. Brickey, 779 S.W.2d 152 (1989) 8
Ramsay, Trustee v. Vogel, et al., 970 F.2d 471 (8th Cir. 1992) 4-6, 10, 13
Randall v. Loftsgaarden, 478 U.S. 647 (rev'g. 768 F.2d 949) 11
Robertson v. Isomedic, Inc. (In re Int'l Nutronics, Inc.), 3 F.3d 306 (9th Cir. 1993) 9
Salve Regina College v. Russell, 499 U.S. 225 (1991) 14

Smith v. World Ins. Co., 38 F.3d 1456 (8th Cir. 1994) 13
Teamsters v. Terry, 494 U.S. 558 (1990) 14
Toibb v. Radloff, 501 U.S. 157 (1991) 6, 9
Tull v. United States, 481 U.S. 412 (1987) 14
United States v. Ron Pair Enter., Inc., 489 U.S. 235 (1989) 6
Wynfield Inns v. Edward Leroux Group, Inc., 896 F.2d 483 (11th Cir. 1990) 10

CONSTITUTION AND STATUTES

11 U.S.C. § 323(a) 3
11 U.S.C. § 363(b)(1) 3
11 U.S.C. § 363(n) 3-16
28 U.S.C. § 1291 2
28 U.S.C. § 1334 2
U.S. Const. Amend. 7 2
U.S. Const. art. I, § 8, cl. 4 1,9
U.S. Const. art. III, § 1 2

RULES

Fed. R. Civ. P. 50 5
Sup. Ct. R. 10 7

OTHER AUTHORITIES

H.R. Rep. No. 95-595, 95th Cong., 2nd Sess., at 346 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6302 6
S. Rep. No. 95-989, 95th Cong., 2nd Sess., at 57, reprinted in 1978 U.S.C.C.A.N. 5787, 5843. 6

OPINIONS BELOW

1. Landscape Properties, Inc., Debtor in Possession v. Robert A. Vogel, Richard C. Downing, and Joe D. Whisenhunt, Appellees, Wingfield Martin and Milton T. Schaeffer, Defendants, 46 F.3d 1416 (8th Cir. 1995). App. 3A.

2. The unpublished January 3, 1994, Judgment on a jury verdict entered on December 17, 1993. App. 24A .

3. The unpublished District Court's December 3, 1992, Order refusing leave to amend. App. 25A.

4. Ramsay, Trustee v. Vogel, et al., 970 F.2d 471 (8th Cir. 1992). App. 29A.

5. The unpublished Order of the District Court Dismissing the Complaint entered October 9, 1991. App. 39A.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 1651. The jurisdiction of the Bankruptcy and District Courts was properly invoked pursuant to 28 U.S.C. §§ 157 and 1334. On March 28, 1995, the Eighth Circuit entered its order denying Landscape's petition for rehearing. App. 2A.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The questions presented by this petition involve the interpretation of Articles I and III of the Constitution of the United States, relating to the constitutional basis for, and the powers of, the bankruptcy courts under Title 11 of the United States Code. In particular, the questions are the extent of the protection provided by 11 U.S. Code § 363(n) against collusive sales.

U.S. Const. art. I, § 8, cl. 4: The Congress shall have

Power...To establish...uniform Laws on the subject of Bankruptcy throughout the United States.

U.S. Const. art. III,§1: The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. Amend. 7: In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury, shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law.
28 U.S.C. § 1334(a): Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under Title 11.

28 U.S.C. § 1334(b): Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under Title 11.

28 U.S.C. § 1291: The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions,
of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the Federal Circuit shall

be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

11 U.S.C. § 323(a): The trustee in a case under this title is the representative of the estate.

11 U.S.C. § 363(b)(1): The trustee, after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate.

11 U.S.C.§ 363(c)(1): If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

11 U.S.C. § 363(n): The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorney's fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.
The full text of 11 U.S. Code § 363 is set out at App. 48A.

STATEMENT OF THE CASE

The bankruptcy court refused to approve a sale of real property belonging to the bankruptcy estate of Landscape Proper-

ties, Inc. to Respondent Robert A. Vogel by Order entered October 31, 1988. The sale to Vogel was not approved because Respondent Joe D. Whisenhunt had made a higher offer for the property. By written Agreement dated November 3, 1988, Respondents agreed "to resolve their competing interests in the property".

Respondent agreed that Whisenhunt, at his option, would either (i) pay Vogel $350,000.00 and receive an assignment of Vogel's offer to buy the estate's property for $1,200,000.00, or, (ii) require Vogel to pay Whisenhunt $350,000 with Vogel retaining the right to buy the estate's property for $1,200,00.00, and that (iii) Whisenhunt's offer of $1,225,000.00 and his objection to the sale to Vogel would be withdrawn. ("Agreement"). Before agreeing, Vogel learned that his tenant would pay more rent if Vogel had to pay Whisenhunt $350,000.00.

After Whisenhunt withdrew his offer of $1,225,000.00 and his objection to the sale to Vogel there was no objection to the sale to Vogel, and no higher offer before the bankruptcy court. The bankruptcy court approved the $1.2 million sale to Vogel at a hearing on November 4, 1988, and entered an Order approving the sale to Vogel on November 18, 1988. The sale to Vogel yielded at least $25,000.00 less (probably at least $350,000.00 less) than it would have received if Whisenhunt had not withdrawn his higher offer.

After November 18, 1988, the Chapter 7 trustee was told of an assignment by Vogel. The trustee believed that the assignment had been negotiated after court approval of the sale. The trustee would have refused to close if he had known of the Agreement before closing. After closing the sale for $1,200,000.00 on January 3, 1989, the trustee learned of Respondents' Agreement. He filed the § 363(n) Complaint herein on May 23, 1989.

On October 9, 1991, the district court dismissed the Complaint, holding that § 363(n) did not apply to private sales. App. 39A. The Eighth Circuit reversed. *Ramsay, Trustee v. Vogel, et*

al., 970 F.2d 471 (8th Cir. 1992). After remand, the district court denied leave to amend the Complaint on December 3, 1992, stating that the Chapter 7 trustee had elected the remedy of damages in the original Complaint and that he had waited too long to seek an amendment. App. 25A. The case was converted to Chapter 11, and the case was tried to a jury in December 1993.

At trial, Respondents admitted making and performing the Agreement. They defended on the grounds that the trustee got his bargain and that the trustee was precluded from recovery because of (i) waiver and estoppel and (ii) "assignability" of the Vogel offer. Vogel contended that the $350,000.00 paid by Whisenhunt was compensation for Vogel's "business opportunity". Whisenhunt testified that Vogel kept his business opportunity and just moved it down the street.

After submission of all evidence, Petitioner elected to avoid the sale and moved: (i) for judgment pursuant to Fed. R. Civ. P. 50, (ii) for judgment that the November 18, 1988, Order approving the sale to Vogel was void, and (iii) to submit only the matter of punitive damages to the jury. The motions were denied, as was Petitioner's motion to conform the pleadings to the proof. Petitioner preserved objections to jury instructions.

The Eighth Circuit affirmed the judgment entered on the jury verdict for Respondents. *Landscape Properties, Inc., D.I.P. v. Vogel, et al.*, 46 F.3d 1416 (1995). Petitioner's request for rehearing was denied on March 28, 1995. This Petition for Writ of Certiorari is timely.

ARGUMENT FOR ALLOWANCE OF THE WRIT

The questions to be decided by the Court are matters important in the orderly administration of estates under the Bankruptcy Code. § 363(n) protects every sale by every bankruptcy trustee from agreements that prevent bankruptcy estates from receiving the full value of the estate's property. *Ramsay, Trustee v. Vogel, et al., 970 F.2d 471.*

Both the House and Senate committee reports on 11 U.S. Code § 363(n) stated that § 363(n) "is directed at collusive bidding on property sold under this section. It permits the trustee to avoid a sale if the price of the sale was controlled by an agreement among potential bidders." H.R. Rep. No. 95-595, 95th Cong., 2nd Sess., at 346 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6302; S. Rep. No. 95-989, 95th Cong., 2nd Sess., at 57, reprinted in 1978 U.S.C.C.A.N. 5787, 5843. *Ramsay, Trustee v. Vogel, et al.*, 970 F.2d 471, 474.

One significant policy of the Bankruptcy Code is to maximize the value of the bankruptcy estate. *Toibb v. Radloff*, 501 U.S. 157, 163 (1991). The injury that is inflicted on the bankruptcy estate by price controlled agreements is to deny it the full value of its property.

The Eighth Circuit decided important questions of federal law that have not been, but should be, settled by this Court. The questions are:

(i) Are there common law defenses to a violation of 11 U.S.C. § 363(n)?

(ii) Does the common law doctrine of election of remedies apply to a suit under 11 U.S.C. § 363(n)?

(iii) What are the roles of the court and jury in determining matters under 11 U.S.C. § 363(n)?

Landscape Properties, Inc., D.I.P. v. Vogel, et al., 46 F.3d 1416, interpreted § 363(n) contrary to its plain, unambiguous language and contrary to decisions of this Court on statutory interpretation of the Bankruptcy Code. *Toibb v. Radloff*, 501 U.S. at 160; *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 240-41, (1989) ("as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute").

The questions before the Court are matters of first impression. *Landscape Properties, Inc., D.I.P. v. Vogel, et al.*, 46 F.3d 1416, erodes the protection against collusive sales provided by § 363(n) by permitting common law affirmative defenses. Con-

gress knows how to provide for such defenses, but did not. *City of Chicago v. Environmental Defense Fund,* 511 U.S.___, 114 S. Ct. 1588, 128 L. Ed. 2d 302 (1994).

The Eighth Circuit ruling requires the trustee to choose between avoidance of the sale and the recovery of the difference in value between the property sold and the sale price at the time suit is commenced. Requiring a choice of method of recovery at the time suit is filed does not advance the accepted policy of maximizing bankruptcy estates. Submission of all issues under § 363(n) matters to the jury prevents prompt resolution of the matter and unduly prolongs administration of bankruptcy estates, especially if the buyer at the controlled price will obtain the benefit of any increase in value of the property during litigation.

The interpretation of 11 U.S. Code § 363(n) is an important question of federal law that should be decided by this court. Sup. Ct. R. 10.

COMMON LAW DEFENSES TO A VIOLATION OF § 363(n).

The District Court instructed the jury on the affirmative common law defenses of waiver and estoppel. The Complaint did not assert any common law claims.

Landscape Properties, Inc., D.I.P. v. Vogel, et al., 46 F.3d 1416, 1425, stated:

> "Landscape has not shown that the district court's waiver and estoppel instructions were erroneous. We know of no authority to support Landscape's contentions that these de fenses are not available in a suit under § 363(n)..."

There was no authority. The question is of first impression.

Waiver and estoppel require a change in position by the defendant induced by conduct of the plaintiff. Here, the change

of position was Whisenhunt's payment of $350,000.00 to Vogel, and the purchase price to the Chapter 7 trustee. The conduct by the Chapter 7 trustee was the closing of the sale with knowledge of an assignment by Vogel. It is undisputed that the trustee did not learn of Respondents' Agreement until after the sale was closed. Even so, Respondents contended at trial that the Chapter 7 trustee had a duty to discover Respondents' Agreement, and was estopped because he did not.

Landscape Properties, Inc., D.I.P. v. Vogel, et al., 46 F.3d 1416, 1422, noted that a trustee will generally not discover a 363(n) violation until after close of the sale. The decision did not discuss the instruction also given the jury that: "...the plaintiff must have acted with knowledge of all pertinent facts it actually had or which it would have discovered by prudent inquiry". The doctrine of laches is inapplicable in actions for damages, for accounting, for the recovery of money or property fraudulently obtained, and the like. *Anadarko Petroleum Co. v. Venable*, 850 S.W. 2d 302 (1993); *Peek v. Brickey*, 779 S.W.2d 152 (1989). Nothing in the plain language of the statute makes the common law defense of laches available in a suit under § 363(n). A bid rigging should not escape effective redress because it was successfully concealed from a trustee until after closing. If failure to discover the violation of § 363(n) is lack of diligence, such lack of diligence should not prevent recovery by a successor trustee.

The instruction that the trustee acted with knowledge presumes that a trustee's knowledge of an agreement to control the price is a defense under § 363(n). § 363(n) does not read: "Unless he knows about an agreement to control the price, the trustee may avoid etc.".

This Court should decide whether a trustee's knowledge that there has been an agreement to control the price will preclude recovery under § 363(n) by such trustee or by a successor trustee. A split in the circuits is indicated by *Gumport v. China Int'l Trust & Inv. Co. (In re Intermagnetics America,*

Inc.), 926 F.2d. 912 (9th Cir. 1991) and *Robertson v. Isomedic, Inc. (In re Int'l Nutronics, Inc.)*, 3 F.3d 306 (9th Cir. 1993). Both cases suggest that a trustee's prior knowledge is not a defense. *Gumport* involved benefit to an officer of the debtor from the collusive sale. *Gumport v. China Int'l Trust & Inv. Co.*, 926 F.2d, 912, 914. The trustee in *Robertson* must have known there was an agreement to control the price. *Robertson v. Isomedic, Inc.*, 3 F.3d 306, 308.

Landscape Properties, Inc., D.I.P. v. Vogel, et al., 46 F.3d 1416, 1425 approved the instruction to the jury on assignability of the Vogel offer because it conformed to Arkansas law. The effect of the instruction was that there is no violation of 11 U.S.C. § 363(n) because a bid may be assigned. An agreement to control the price is academic unless a potential bidder actually obtains the property. § 363(n) is directed to sales where the price is controlled. The method by which such agreement is carried out should not matter. Recovery under § 363(n) should not turn on which bidder gets the property. The jury should have been instructed that an assignment is a means to consummate an agreement to control the price.

Congress provided the § 363(n) remedy, unknown at common law, to take the profit out of collusive bidding for property of a bankruptcy estate. The plain reading of § 363(n) and the Bankruptcy Code does not suggest that Congress provided a defense to the remedy it created, including laches, waiver or estoppel. If Congress wished to provide a defense to a violation of § 363(n), it certainly knew how to do so. *BFP v. Resolution Trust Corp.*, 511 U.S. ___, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994); *Central Bk. v. First Interstate Bk.*, 511 U.S. ___, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994); *Toibb v. Radloff*, 501 U.S. 157 (1991).

This is not a case of the Bankruptcy Code impinging on a long established state practice. No essential state interest is at issue. Looking to state common law for defenses to a violation of § 363(n) will surely cause 11 U.S. Code § 363(n) to lack the

uniformity required by U.S. Const. art. I, § 8, cl. 4.

COMMON LAW ELECTION OF REMEDIES AND § 363(n)

Ramsay, Trustee v. Vogel, et al., 970 F.2d 471, 475, held that the Complaint did not contain common law claims and invited an amendment of the Complaint. The district court denied the motion to amend the Complaint, filed promptly after remand, holding that the Chapter 7 trustee had elected the remedy of damages when he filed the Complaint and that he had waited too long before seeking to amend the Complaint. *Landscape Properties, Inc., D.I.P. v. Vogel, et al.*, 46 F.3d 1416, 1423, affirmed.

§ 363(n) is silent about when a trustee must choose to avoid the sale or to seek to recover the difference between value of the property and the price at which it was sold. It is also silent about the date when such difference in value should be measured.

The Complaint requested all other "just and equitable relief". Petitioner elected to avoid the sale after all proof had been submitted. The Eighth Circuit affirmed the district court's refusal to permit the election.

The Eighth Circuit refused to follow the accepted and usual course of judicial proceedings that a plaintiff has the right to try his case on alternative theories and cannot be required to elect upon which theory to proceed. *Falcon Jet Corp. v. King Enter., Inc.* (In re King Enter.), 678 F.2d 73, 76 (8th Cir. 1982). The Eighth Circuit decision conflicts not only with its own rule, but also with the rule of the Eleventh Circuit that an election between inconsistent remedies may be made after a verdict but before the entry of judgment. *Wynfield Inns v. Edward Leroux Group, Inc.*, 896 F.2d 483 (11th Cir. 1990).

The doctrine of election of remedies does not prevent recovery of the maximum amount recoverable under any claim.

Grogan v. Garner, 806 F.2d 829, 839 (8th Cir. 1986). This is not a case where the Chapter 7 trustee delayed suit to increase an expected recovery. *Randall v. Loftsgaarden,* 478 U.S. 647 (rev'g. 768 F.2d 949). The Chapter trustee sued promptly after discovery of Respondents' Agreement, and promptly moved to amend after the mandate from the Eighth Circuit. When leave to amend was denied, not all of the defendants had answered.

The primary relief available to a trustee under § 363(n) is to avoid the sale. A sale is avoided when a court says the sale is avoided.

The plain language of § 363(n) is that if the sale is not avoided, the trustee may recover from a party to such agreement "any amount" by which the value of the property sold exceeds the price at which such sale was consummated. The section does not read: "the amount by which the value (at the time of sale) of the property sold exceeds the price at which the sale was consummated." "Any amount" is a different concept from "the amount". "Any amount" is not the same as "substantial amount". Even if the difference in value is zero, the trustee may avoid the sale and recover attorney's fees and cost.

The choice made by a trustee between avoiding the sale and recovering the difference in value is a matter of administration best left to the discretion of the trustee. The economic effect on the estate should be the same for either method of recovery of the bidders profits. Petitioner proffered proof of value as of the date of trial.

Landscape Properties, Inc., D.I.P. v. Vogel, et al., 46 F.3d 1416, 1425, approved an instruction to the jury that the plaintiff had to prove a difference between the value of the property and the sales price as of the date of the Order approving sale, which was entered on November 18, 1988. § 363(n) does not read: "The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale (and such sale price was less than the value of the property sold)". The plain language of the statute does not

require a three part test for a violation of § 363(n).

There are different concepts of value in matters under the Bankruptcy Code. *BFP v. Resolution Trust Corp.* 511 U.S.___ (1994). Value must often be proved as a question of fact.

The instruction that the jury must consider difference in value at the time the bankruptcy court approved the sale was to require the Chapter 7 trustee to elect remedies before he knew he had remedies to elect. To maximize assets of the estate, and promote uniformity of the bankruptcy law, the trustee should have the right to choose to avoid the sale at any time before entry of judgement.

The choice for this Court is whether the bankruptcy estate or the buyer at the controlled price should have the benefit of value increases during litigation. Congress manifested no intent that collusive bidders should profit from their activity. Nothing in the plain language of the statute suggests Congress intended that a collusive bidder must disgorge profit from the collusive sale made before suit but may keep such profit accruing thereafter.

Allowing the trustee to make his the choice of remedies after the jury verdict and before entry of judgment does not depart from the plain language of the statute. Choice at such time is consistent with the purpose of the Bankruptcy Code to maximize the value of the estate. Controlling the price at which a trustee sells property of the estate should be inherently unprofitable.

THE ROLES OF COURT AND JURY UNDER § 363(n)

Landscape Properties, Inc., D.I.P. v. Vogel, et al., 46 F.3d 1416, 1426, affirmed a refusal to instruct the jury that Respondents' Agreement was precisely the evil that Congress intended to deal with in subsection 363(n), because such instruction would have been tantamount to directing a verdict. Petitioner moved for judgment as a matter of law. The motion should have been granted, and the case should not have been submit-

ted to a jury.

Petitioner moved to submit only the question of punitive damages to the jury, if anything went to the jury. § 363(n) permits imposition of punitive damages if there was wilful disregard of the subsection. The question of punitive damages arises only after it has been determined that there was an agreement to control the price.

Granfinancieara, S.A. v. Nordberg, 492 U.S. 33 (1989) affirmed the right to trial by jury in bankruptcy adversary proceedings involving "private rights" triable by a jury at common law. Clearly, the Complaint herein did not contain common law claims. *Ramsay, Trustee v. Vogel, et al.*, 970 F.2d 471. Common law claims are not a necessary part of a suit under §363(n). *Landscape Properties, Inc., D.I.P. v. Vogel, et al.*, 46 F.3d 1416, 1422.

There is no right to trial by jury of equitable issues or public rights. The district court submitted equitable defenses to the jury. The determination of equitable defenses and equitable remedies is a matter for the court, rather than the jury, to decide. *Smith v. World Ins. Co.*, 38 F.3d 1456, 1465 (8th Cir. 1994).

The remedy under § 363(n) was created by Congress. The remedy under § 363(n) is a statutory right within Congress' power to enact. *Landscape Properties, Inc., D.I.P. v. Vogel, et al.*, 46 F.3d 1416, 1424, viewed Petitioner's claims as inherently legal because the action was characterized as one for the recovery of damages.

Avoidance of the sale is inherently equitable. The recovery of the difference between the value of the property and the controlled sale price is designed to place a bankruptcy estate in the economic position it would be in if the sale were avoided. The relief under § 363(n) should be characterized as one for disgorgement of profits, rather than the recovery of "legal" damages. An award of money is not necessarily "legal relief". *Granfinanciera, S. A. v. Nordberg*, 492 U.S. at 91; *Curtis v. Loether*, 415 U.S. 189, 196 (1974).

Here, the remedy is recovery of "any amount", not "any damages". The remedy is not for "damages", but for disgorgement of the profit of the bidders at the sale who controlled the price. Such remedy is equitable. *Teamsters v. Terry*, 494 U.S. 558, 570 (1990); *Tull v. United States*, 481 U.S. 412, 426-427 (1987).

In any event, this case should not have been submitted to the jury. Respondents admitted making and performing their Agreement. Such Agreement included withdrawal of a higher offer for the property. Whether the trustee must also prove a difference in value in order to recover, clearly the price at which the Chapter 7 trustee sold was less than the higher offer which Whisenhunt withdrew because of the Agreement. When the matter is undisputed or admitted, a verdict may be directed. *Tull v. United States*, 481 U.S. at 419 (the court may withdraw a case from the jury and direct a verdict, according to the law if the evidence is uncontradicted and raises only a question of law).

Landscape Properties, Inc., D.I.P. v. Vogel, et al., 46 F.3d 1416, 1426, did not review the correctness of the denial of Petitioner's motion for judgment as a matter of law on a *de novo* standard. This Court should resolve the conflict with *Markman, et al. v. Westview Instruments, Inc., et al.*, No. 92-1049, Slip Op. at 18 (Fed. Cir. April 5, 1995), and *Elder v. Holloway*, 510 U.S. ___, 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994) (Whether an asserted federal right was clearly established is a question of law that must be resolved *de novo* on appeal). When *de novo* review is compelled, no form of appellate deference is acceptable. *Salve Regina College v. Russell*, 499 U.S. 225 (1991).

Landscape Properties, Inc., D.I.P. v. Vogel, et al., 46 F.3d 1416, 1426, quotes Vogel's testimony that he and Whisenhunt were business men who had a common interest to work out an arrangement that is done every day in business, and that what he and Whisenhunt did was to:

> "...in a friendly manner resolved a financial arrangement that we do in business, in our type of business every day...I mean, it's business".

Nothing in the language of the statute or its history supports a business man's exception to the reach of § 363(n). Nothing in the legislative history of the Bankruptcy Code or § 363(n) suggests that Congress intended to allow a business deal such as Respondents' agreement to escape § 363 (n).

Landscape Properties, Inc., D.I.P. v. Vogel, et al., 46 F.3d 1416, 1427 notes language by the District Court that:

> "...there's a lot of proof in the case that the agreement between Mr. Vogel and Mr. Whisenhunt had to do with the purchase of the contract right, for the assignment of that right, for getting-either getting rid of the other, and did not represent a sum of money that would otherwise have gone into the hand of the trustee",

Such reasoning followed Respondents' contention that Petitioner could not recover because the trustee got his bargain.

The trustee will always get his bargain when the sale price has been controlled. That is the bargain that § 363(n) proscribes.

It is beside the point whether the estate would have received the $350,000.00 paid by Whisenhunt to Vogel. Clearly, Respondents' Agreement included the withdrawal of Whisenhunt's offer to the estate. That caused the estate's property to be sold for the price offered by Respondent Vogel, rather than the higher price offered by Whisenhunt. Accordingly, as a matter of law, the price was controlled by an agreement among potential bidders at such sale.

The quotations from Vogel's testimony and the District Court's remarks will lead many to urge that there is an exception to the reach of § 363(n) for friendly bid rigging, and for bid rigging in the ordinary course of the bidders' business. Surely, that is not what Congress intended when it enacted § 363(n).

The Court is here presented an opportunity to establish clear

precedent for matters that are of vital interest in the administration of every bankruptcy estate. Petitioner urges that the plain language of § 363(n) does not permit the defenses that the jury was allowed to consider; that the time for election between avoiding the sale and recovering the difference in the price is any time before judgment; and that this case should not have been submitted to the jury.

CONCLUSION

The Court should issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

RESPECTFULLY SUBMITTED,

C. Richard Crockett*
R.J. Brown
Crockett & Brown PLLC
P.O. Box 24003
Little Rock, Arkansas 72221
(501) 221-2939
Attorney for Petitioner, Landscape Properties, Inc., Debtor in Possession

**Counsel of Record*

APPENDIX

Page

1. *Landscape Properties, Inc., Debtor in Possession v. Robert A. Vogel, Richard C. Downing, and Joe D. Whisenhunt, Appellees, Wingfield Martin and Milton T. Schaeffer, Defendants,* 46 F.3d 1416 (8th Cir. 1995). 3A

2. Order denying Petition for Rehearing entered by the Eighth Circuit on March 28, 1995. ..... 23A

3. Judgment of the District Court for the Eastern District of Arkansas, Western Division entered January 3, 1994. ..... 24A

4. Order of the District Court for the Eastern District of Arkansas, Western Division denying leave to amend entered December 3, 1992. ..... 25A

5. *Ramsay, Trustee v. Vogel, et al.*, 970 F.2d 471 (8th Cir. 1992). 29A

6. Order of the District Court for the Eastern District of Arkansas, Western Division dismissing the Complaint entered October 9, 1991. ..... 39A

7. Order of the District Court for the Eastern District of Arkansas, Western Division dismissing Richard C. Downing entered October 16, 1991. ..... 42A

Page

8. Landscape Properties, Inc., 100 B.R. 445 (Bkrtcy. E.D.Ark. 1988) 43A

9. 11 U.S. Code 363. ..... 48A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

94-1234-EALR

Landscape Properties, Inc., Debtor in Possession,

Appellant,

v.

Robert A. Vogel, Richard C. Downing, Joe D.Whisenhunt,

Appellees,

Wingfield Martin; Milton T. Schaeffer,

Defendants.

Appeal from the United States District Court
for the Eastern District of Arkansas

Submitted: November 16, 1994
Filed: February 2, 1995

Before BEAM, Circuit Judge, FRIEDMAN*, Senior Circuit Judge and LOKEN, Circuit Judge.

FRIEDMAN, Senior Circuit Judge.

Section 363(n) of the Bankruptcy Reform Act of 1978, 11 U.S.C. 5 363(n) (1988), authorizes a bankruptcy trustee to "avoid" a sale of the bankruptcy estate's property or to recover damages "if the sale price was controlled by an agreement among potential bidders at such sale ." In the prior appeal in

*DANIEL M. FRIEDMAN, Senior Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation.

this case, we held that § 363(n) is not limited to sales at public auction, as the district court ruled, but also covered private sales. We therefore reversed the district court's dismissal of a trustee's suit seeking damages for an alleged collusive private sale of a bankrupt estate's property and remanded the case. *Ramsay v. Vogel*, 970 F.2d 471 (8th Cir. 1992). On the remand, a jury held for the defendants. We uphold that verdict against various challenges, and do not disturb the district court's denial of the plaintiff's motion to amend the complaint.

I.

A. In September, 1988, Ramsay, the Chapter 7 bankruptcy trustee of the debtor Landscape Properties, Inc. (Landscape), contracted to sell certain of Landscape's real property (the Property) to Vogel for $1,200,000. After the bankruptcy court authorized the sale, the parties closed the transaction in early 1989, and the trustee conveyed the Property to Downing, to whom Vogel had assigned his rights under the contract.

Following the closing, the trustee learned of an earlier agreement between Vogel and Downing, under which Vogel agreed to assign to Downing Vogel's rights under the purchase agreement, and Downing agreed to pay Vogel $350,000 and to withdraw a pending offer to purchase the Property for $1,225,000 (which Downing did). The trustee then filed suit in the bankruptcy court against Vogel, Downing and others. The complaint alleged that the defendants were parties to a collusive agreement to control the sale price of bankruptcy estate property, which deprived the estate of at least $350,000, "in willful disregard of the rights of the estate and the provisions of 11 U.S.C. 363(n)." The trustee sought a determination of the fair market value of the property, compensatory damages of at least $350,000 and punitive damages of $1, 000, 000.

The defendants demanded a jury trial and the bankruptcy court certified the case to the district court. The district court** dismissed the complaint, on the ground that § 363(n) covered only sales at public auctions, and not private sales.

On the trustee's appeal, this court reversed. We held that the statutory words "potential bidders at such sale" are not "limited to bidding at a public auction sale" but "cover all persons who are contemplating making an offer to purchase property of a bankrupt estate that the trustee seeks to sell, whether such sale be private or at public auction." *Ramsay,* 970 F.2d at 473. We pointed out that the injury that "price collusion among potential purchasers of the property"

> inflicts upon the bankrupt estate--denying it, and therefore the bankrupt's creditors, the full value of the property in the estate--is the same whether the collusion occurs in connection with a private sale or a public auction. In this case, for example, the effect of the collusion alleged in the trustee's complaint was to produce for the bankrupt estate an amount that was at least $350,000 less than the fair market value of the property. The result of the Vogel-Downing agreement was that although the property cost Downing $350,000 more than the $1,200,000 for which the trustee sold it, the additional amount went not to the bankrupt estate but to another potential purchaser of the property.

Id. at 474.

We added that "[t]he collusion among prospective purchas-

**Honorable Stephen M. Reasoner, United States District Judge for the Eastern District of Arkansas.

We rejected the trustee's contention that, in addition to the charge under § 363(n), the complaint also alleged state common law claims of conspiracy and fraud, which the district court erroneously dismissed. "Fairly read, the complaint did not allege common law claims or conspiracy or fraud." *Id.* at 475. We stated, however:

> On the remand we order, the trustee may, of course, move to amend his complaint as he deems appropriate, including the addition of common law claims. The decision whether to permit such amendment lies primarily within the district court's discretion.

Id. at 475-6

B. Shortly after the mandate of this court issued, the trustee moved in the district court to file an amended and substituted complaint. The proposed complaint would have added to the original request for damages (increased in amount to $5,000,000 and described in count II as a claim seeking 'recovery of the value of the property"), an additional claim seeking "Avoidance of the Sale" (proposed count I). Proposed count V was a claim for punitive damages in excess of $2,000,000. The proposed complaint also sought to add three additional parties.

The district court denied leave to file the amended and supplemental complaint. The court ruled:

> It is readily apparent from a reading of the statute that the remedies provided are in the alternative and that a party must choose which remedy to pursue. The Trustee elected the remedy of damages in the original complaint and seeks three years later to elect the alternative remedy of

> avoidance, admittedly to seek a better recovery in the action. However, plaintiff offers no reason why he waited three years to seek amendment to the complaint when he acknowledges that in the interim, the property was sold, leased, developed and mortgaged. Clearly the opposing parties to this action, and the parties sought to be added, would be prejudiced by the late amendment. Under the circumstances of this case, justice does not require leave of court to allow for the amendment.

Shortly before trial, Landscape converted its Chapter 7 liquidating bankruptcy to a Chapter 11 reorganization proceeding, and on the trustee's motion the court substituted Landscape as debtor in possession for the trustee as the plaintiff. No party questions the authority of Landscape to continue to prosecute the action that the trustee began. *Cf. Minnesota Mining & Mfg. Co. v. Eco Chem. Inc.*, 757 F.2d 1256, 1261-1265 (Fed. Cir. 1985). (Stating that if a party is substituted pursuant to F.R.C.P. 25 (c), "[t]he merits of the case, and the disposition of the property, are still determined vis-a-vis the originally named parties").

After trial, the jury found for the defendants and the district court dismissed the complaint.

C. Viewing the evidence most favorably to and drawing all reasonable inferences in favor of the verdict, *Finley v. Empire Gas Inc.*, 975 F.2d 467, 474 (8th Cir. 8992), the jury could have found the following facts:

In its bankruptcy schedules filed in July 1988, sworn to by Landscape's vice president and secretary, the Property was valued at $1,200,000. In July 1988, the month after the bankruptcy petition was filed, James Hathaway offered the trustee $1,000,000 for the Property. The trustee made a counter offer

of $1.2 million. Over the next few weeks the trustee solicited offers from others. Hathaway then made another offer to buy all of Landscape's properties for $1,300,316, of which $960,000 was for the Property. At about the same time Downing, on behalf of Whisenhunt, offered $900,000 for all of Landscape's properties.

In the middle of August, the trustee received from Vogel an offer to buy the Property for $1.1 million. After talking with other prospective purchasers, the trustee met with the two owners of Landscape and discussed the price at which the Property should be sold. The owners had rejected Hathaway's $1,000,000 offer because they wanted $1.2 million, and they authorized a counter offer to Vogel at $1.2 million, which the trustee made.

Vogel counter-offered to pay $1.15 million. The owners rejected that offer and the trustee redrafted the contract at $1.2 million. Vogel accepted and signed the contract on September 1, 1988.

The trustee then gave notice through the bankruptcy court of his intention to sell to Vogel at that price. Landscape and Martin filed objections with the bankruptcy court. At the hearing on those objections, after Landscape withdrew its objection, Downing, representing Whisenhunt, offered $1,225,000. In light of this higher offer, the bankruptcy court declined to approve the sale, and subsequently continued the hearing to allow Vogel to submit further evidence in support of his contract with the trustee.

Prior to the reopened hearing, the trustee was notified that Martin would withdraw his objection, which he did on the day of the hearing. Downing also withdrew his $1,225,000 offer. At the reopened hearing, there was no objection to Vogel's $1,200,000 offer. Shortly after the hearing, the bankruptcy court authorized the sale to Vogel.

The November 3, 1988 agreement under which Vogel assigned his interest under the contract to Downing for $350,000 and agreed to withdraw his offer $1,225,000, and Downing

agreed to pay Vogel $350,000, was dated the day before the reopened hearing in the bankruptcy court. Prior to that agreement and in reliance upon the September 1 signed purchase and sale agreement, Vogel, a real estate developer, had hired an architect, negotiated with a prospective tenant, developed plans and drawings for a shopping center, and received a letter of intent from Safeway to lease a store there.

Part of the money paid at the closing was, with the approval of the bankruptcy court, used to pay the first mortgage on the Property of $497,301. The bankruptcy court subsequently approved, over Vogel's objection, the trustee's request to use the balance of the $1,200,000 purchase price to pay general creditors, the Internal Revenue Service, and legal expenses, and to disperse to the two owners of Landscape $75,000 each. After the trustee made those payments, slightly more than $280,000 remained in the estate.

II.

Two fallacious contentions underlie Landscape's arguments.

A. Landscape states that our prior decision is the law of the case that "the effect of the collusion alleged in the trustee's complaint was to produce for the bankrupt estate an amount that was at least $350,000 less than the fair market value of the property . . . Arguably, the law of the case is that the value exceeded the sale price by $350,000.00." Our prior decision, however, intimated no views on the merits of the trustee's claim.

The only issue there before us, and the only one we decided, was whether the district court had erroneously dismissed the complaint as not stating a claim under § 363(n) because that section covered only public auction sales. We stated that "in determining whether the complaint states a claim upon which relief may be granted" we accept "[t]he allegations in the complaint." *Ramsay*, 970 F.2d at 472. The statements in our

opinion to which Landscape refers all were based on the allegations Of the complaint and were intended to show that, if the trustee could prove those allegations, he would have established the kind of misconduct that § 363(n) was intended to cover.

The case is now in an entirely different posture. After we held that the complaint stated a valid claim under s 363(n), the case was tried to a jury, which found that Landscape was not entitled to recover. The question now is whether the evidence supports that ruling---and we hold in part VI that it does---and nothing said in our prior opinion casts any doubt on that conclusion.

B. Landscape repeatedly states in its brief that this case involves fraud on the bankruptcy court. The alleged fraud was the failure to disclose to the court, at the second hearing on the proposed sale of the Property to Vogel for $1,200,000, the November 3, 1988 agreement under which Vogel assigned his interest in the contract to Downing for $350,000 and the latter agreed to withdraw his $1,225,000 offer. At that hearing the court asked the trustee:

> Is it your feeling or can you state for the record that you are aware of no collusion between the parties?

The trustee replied:

> I am aware of no collusion. I asked Mr. Downing that specific question and Mr. Davidson [an attorney representing Vogel at the hearing] can probably respond to the Court's question as well, although I have not talked to him, but I am aware of none.

The court then asked the other counsel present (except

Davidson) about collusion. They stated that they did not know of any.

At that time the trustee was not aware of the November 3 agreement. It was only after he found out about it later that he filed the present suit.

The original complaint did not allege fraud on the court.

Although paragraph 38 of the proposed amended and substituted complaint did so allege, the district court denied leave to file that complaint---a ruling we do not disturb, see part III below-and that allegation therefore is not part of this case. Moreover, the two substantive counts of the amended and supplemental complaint charged violation only of § 363(n) and there was no count based upon fraud on the court. Although count III, which sought an accounting from Whisenhunt, alleged that he "obtained the property by fraud", this appears to refer to "fraud on the Trustee" (which also was alleged in paragraph 38) rather than fraud on the court.

"Fraud on the court, though not easily defined, can be characterized as a scheme to interfere with the judicial machinery performing the task of impartial adjudication, as by preventing the opposing party from fairly presenting his case or defense. A finding of fraud on the court is justified only by the most egregious misconduct directed to the court itself, such as bribery of a judge or jury or fabrication of evidence by counsel, and must be supported by clear, unequivocal and convincing evidence." *Pfizer Inc. v. International Rectifier Corp. (In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions)*, 538 F.2d 180, 195 (8th Cir. 1976), *cert. denied*, 429 U.S. 1040 (1977) (citations omitted); *see also Nichols v. Klein Tools Inc.*, 949 F.2d 1047, 1048 (8th Cir. 1991) (quoting *Pfizer*). Landscape's claim of fraud on the court does not even come close to meeting that standard.

Counsel neither made affirmative misrepresentations to the court nor fabricated evidence. Appellant does not contest that each lawyer who was asked by the bankruptcy court whether

he was aware of any "collusion" between the parties truthfully denied knowledge. Davidson said nothing, but he was not asked the question.

Davidson, an experienced bankruptcy practitioner, who represented Vogel in the bankruptcy aspects of this matter, testified that he had advised Vogel that "the transaction that he was doing with Mr. Whisenhunt was a legal transaction, that he had a contract, he had a right of assignment in the contract, and that this transaction was okay." He testified that he heard the bankruptcy judge's question to the trustee about collusion, and answered "No" to the question "did you perceive at that time that that question had anything to do with you or Mr. Vogel or any conduct by either one of you?" Davidson's failure to volunteer an answer to a question he was not asked and which he believed was irrelevant to any conduct by himself or his client cannot, under any theory, be viewed as fraud on the court.

Here, as in *Pfizer Inc.*, "[w]e have reviewed the record of proceedings in the District Court and we believe the conduct of the accused individuals did not evidence a scheme to improperly influence or impair the court's function, and was not egregious misconduct characterizable as fraud on the court." *Id.* The conduct in this case is a far cry from the conduct that was held to constitute fraud on the court in the case Landscape primarily relies on, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-6 (1944). In *Pfizer* this court described the fraud in *Hazel-Atlas* as a "scheme by patentee to defraud the court by relying upon an article supposedly written by a disinterested author, but actually written and published by patentee." *Id.*

Indeed, apart from its pejorative character, the claim of fraud on the court adds nothing analytically to the basic claim under § 363(n). For in virtually every case in which a trustee files suit under that provision to challenge the sale of a bankrupt estate's property, the trustee will have been unaware of the alleged agreement to control the price of the property when he sought and

obtained the bankruptcy court's approval of the sale. It is § 363(n), and not any alleged fraud on the court, which determines whether the sale was improper.

III

Landscape contends that the district court erroneously refused to permit the trustee to amend his complaint to supplement the claim for damages with an additional claim for avoidance of the sale. We need not reach that question, however, because the jury's verdict in favor of the defendants, which we uphold in part VI, makes that issue moot.

The court instructed the jury that to prevail on its claim for damages, Landscape was required to prove "each of three essential propositions:"

> First, that the Defendants were potential bidders at a sale conducted by the Plaintiff;
>
> Second, that the $1,200,000.00 sales price of the property was controlled by an agreement between the Defendants;
>
> Third, that the value of the property at the time of the approval of the sale by the Court on November 18, 1988, exceed[ed] the purchase price of 1,200,000.00 established in the contract between the Plaintiff and Defendant Robert Vogel.

The court further instructed the jury that:

> The Defendants have raised the affirmative defenses of waiver and estopped. Those defenses are based on Plaintiff's own conduct. To the extent the Defendants proved either of them by

> a preponderance of the evidence, the Defendants would not be liable for any conduct to which the defense applies. The basis for these defenses of waiver and estopped is that Plaintiff cannot now complain of conduct of which it approved at the time, or of which it was aware, but against which it took no action to protect itself.

Finally, the court instructed:

> If you decide for the Plaintiff on the question of liability, you must then fix the amount of money by which the fair market value of the property at the time the sale was approved by the Bankruptcy Court on November 18, 1988 exceeded the sale price of $1,200,000.00.
>
> Whether any such excess in value has been proved by the evidence is for you to determine.

When the jury found for the defendants Vogel and Whisenhunt, it necessarily found either that they were not "potential bidders at a sale conducted by" Landscape (which is unlikely in light of the uncontradicted evidence that both had submitted bids for the property), or that the $1,200,000.00 sales price was not "controlled by an agreement between" them, or that the value of the property on November 18, 1988, did not exceed $1,200,000, or that Landscape was barred from recovery by waiver or estopped. The jury therefore was not required to determine the amount by which the fair market price of the property exceeded $1,200,000.00.

Since the jury thus decided against, and not "for the Plaintiff on the question of liability," any question regarding the kind or scope of relief to which the plaintiff would have been entitled had it prevailed on the merits is moot. In fight of the

jury verdict, there no longer was any question whether, if the defendants had been found liable, the plaintiff would have been entitled to avoid the sale instead of recovering damages. Landscape was not prejudiced by the district court's refusal to permit amendment of the complaint to raise the avoidance claim.

IV

Landscape argues that the district court erred in submitting the case to a jury. According to Landscape, the district court should have remanded the case to the bankruptcy court for a bench trial before that court.

After the trustee filed his complaint in the bankruptcy court, the defendants moved for a jury trial. The bankruptcy court ruled that "a bonafide jury trial issue exists" and, because of the decision of this court in *In re United Missouri Bank*, 901 F.2d 1449 (8th Cir. 1990) (discussed below), that "bankruptcy courts lack the statutory authority to conduct jury trials," certified the case to the district court "for determination and if appropriate, trial on the merits before a jury."

At the pretrial hearing before the district court Mr. Brown, counsel for Landscape, apparently acquiesced in a jury trial. He stated:

> MR. BROWN: If I may? That is a serious issue, because the right to trial by jury-this is strictly a statutory cause of action under 363(n). The right to trial by jury is really kind of iffy. We went along with it just because it seemed like if we do a jury, we don't have error, and if we don't do one, we might have error.

In other words, to avoid any issue of possible error if there were a bench trial Landscape "went along with" the jury trial. Such acquiescence must be deemed a waiver of any objection to the jury trial.

In any event, the district court properly held a jury.

In *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989), the Supreme Court held that a person sued by a bankruptcy trustee to recover an allegedly fraudulent money transfer had a Seventh Amendment right to a jury trial. The Court therefore reversed a bankruptcy court's award of damages in a bench trial.

The Court stated that "[t]he Seventh Amendment protects a litigant's right to a jury trial only if a cause of action is legal in nature and it involves a matter of 'private right.'" *Id.* at 42, n. 4. It also stated that "[u]nless a legal cause of action involves public rights, Congress may not deprive parties litigating over such a right of the Seventh Amendment's guarantee to a jury trial." *Id.* at 53. It held that "a bankruptcy trustee's right to recover a fraudulent conveyance under 11 U. S. C. § 548 (a) (2) seems to us more accurately characterized as a private rather than a public right as we have used those terms in our Article III decisions." *Id.* at 55.

In *United Missouri Bank*, a bankruptcy trustee sued in the bankruptcy court to recover from the bank allegedly preferential transfers the bank had received from the bankrupt. The bankruptcy court held that the bank was entitled to a jury trial, which it could conduct. Although we held that the bankruptcy court had no statutory authority to conduct jury trials, "[w]e agree[d] with the bankruptcy judge that the Bank has a constitutional right to a jury trial under *Granfinanciera.*" *United Mo. Bank*, 901 F.2d at 1450, n. 5; *see also id.* at 1455 ("*Granfinanciera*, however, requires that a jury trial be provided in this case.") Although we disagreed with the holding in In re Ben Cooper, Inc., 896 F.2d 1394 (2d Cir.), *vacated on other Grounds*, 498 U.S. 964 (1990) *reinstated*, 924 F.2d 36 (2nd Cir.), *cert. denied*, 500 U.S. 928 (1991), that a bankruptcy court may conduct a jury trial, we did not disagree with the other holding in that case that in a suit by the trustee against an insurance company and two insurance brokers to recover dam-

ages from a fire at the bankrupt's plant, the defendants were entitled to a jury trial because their claims were "inherently legal" rather than equitable. *Id.* at 1402.

The reasoning of those cases warrants the conclusion that Landscape's claim for damages under § 363(n) is inherently legal and involves private rights. Congress has not indicated in that section whether claims thereunder should have jury trials. Nothing there suggests, however, that Congress did not intend a jury trial where the claim was for damages equal to, in the words of the statute, the "amount by which the value of the property sold exceeds the price at which such sale was consummated."

The only claim before the district court was for damages. Although the cause of action for damages that §363(n) created and gave to the trustee may not have been known at common law, it is similar or comparable to the damage claims for recovery of preferential treatment involved in the cases previously discussed. In all those cases, as in the present one, the suit was to recover for the bankrupt estate monies received by third parties to which the bankrupt estate allegedly was entitled. The claim in this case therefore is inherently legal rather than equitable, and involves what are traditionally viewed as private rather than public rights. The district court properly held a jury trial on this claim for damages under § 363(n).

V

Landscape alleges that the district court committed seven errors in its charge to the jury, both by giving allegedly erroneous instructions and failing to give certain of Landscape's proposed instructions.

"The trial court has broad discretion to instruct the jury in the form and language it considers a fair and adequate presentation of substantive law. This court reviews jury instructions to determine whether, taken as a whole, they are confusing or

misleading in presenting the principles of law applicable to the case." *Grogan v. Garner,* 806 F.2d 829, 836 (8th Cir. 1986) (citation omitted). We are satisfied that, taken as a whole, the instructions clearly and properly explained to the jury the legal principles governing the case. In any event, any possible error in misstating the law was not "so egregious, considering the instructions as a whole, as to require the verdict to be set aside." *Naylor v. St. Louis S. Ry.,* 847 F.2d 1305, 1306 (8th Cir. 1988) (quoting *Jamesbury Corp.. v. Litton Indus. Prod.. Inc.,* 756 F.2d 1556, 1560 (Fed. Cir. 1985)).

These contentions do not require extensive discussion.

1. Landscape first contends that the instruction stating the three elements that it was required to prove, set forth in part III above, was erroneous because (a) our prior decision established that the November 3, 1988 agreement between Vogel and Downing controlled the sales price of the property and (b) the instruction used an improper date for determining the value of the property. As we have held, however, our prior decision did not so decide (see part II A above). Furthermore in view of the jury's finding that the defendants were not liable, any issue concerning the date for valuing the property (which related primarily to damages, not liability) is harmless.

2. The instruction that the contract of sale between the trustee and Vogel was assignable, correctly stated Arkansas law. The instruction also told the jury that that contract was "subject to the conditions of approval by the Bankruptcy Court." Landscape's proposed instruction on this subject was unnecessary and confusing, and erroneously stated that an agreement between the trustee and a purchaser is merely an offer" and does not 'become a binding contract until it is approved by the Bankruptcy Court."

3. Landscape has not shown that the district court's waiver and estopped instructions were erroneous. We know of no au-

thority to support Landscape's contention that these defenses are not available in a suit under § 363(n). The two cases Landscape cites do not support its argument. *Gumport v. China Int'l. Trust & Inv. Co. (In re Intermagnetics Am., Inc.)*, 926 F.2d 912 (9th Cir. 1991), held that a bankruptcy court's order approving a sale of a bankrupt's property did not bar a subsequent suit by the trustee under § 363(n) to avoid the sale on the ground that the bankruptcy court's approval of it was based on false representations. *Robertson v. Isomedic, Inc. (In re Int'l Nutronics, Inc.)*, 3 F.3d 306 (9th Cir. 1993), held that a trustee's suit under § 363(n) was barred because it was not filed within one year of the bankruptcy court's order approving the sale, the period under Rule 60 (b) of the F.R.C.P. for setting aside a judgment for misconduct.

4. The district court correctly charged the jury that Landscape was bound by the trustee's actions. Indeed, at the hearing to substitute Landscape for the trustee as the plaintiff, Landscape conceded that it was so bound. When the court indicated that it would grant the substitution and stated that if the issue arose it would tell the jury that "the Plaintiff is bound by any actions or inactions of the trustee," Mr. Brown, Landscape's counsel, replied "[t]hat's correct, and we've tendered an instruction along that line." The following colloquy then occurred:

> THE COURT: From the very beginning the Defendants can tell the jury that in opening statement and there won't be any issue that comes up that questions that in any regard, as far as what we do in front of the jury and the instructions that we give the jury.
>
> MR. BROWN: That's correct.

5. The district court correctly refused to give Landscape's proposed instruction that the November 3rd agreement was

"precisely the evil congress intended to deal with in subsection 363(n)." That instruction would have been tantamount to directing a verdict.

6. The instruction regarding the defendants' reliance on advice of counsel related only to the claim for punitive damages. The instruction explained that the defendants were relying on advice of counsel to show "they are not guilty of willful or deliberate wrongdoing," which the court previously had told the jury was a prerequisite to the award of punitive damages. In view of the jury's verdict, the claim for punitive damages is no longer an issue in the case.

7. Landscape's proposed instruction on ignorance of the law also related to the claim for punitive damages, and the jury verdict makes that refusal moot.

VI

Finally, Landscape challenges the sufficiency of the evidence to support the jury verdict. The argument takes two forms: First, Landscape argues that the district court should have directed a verdict in its favor. Second, it asserts that the record cannot sustain the verdict.

Both formulations rest in large part on the contention, which we have rejected, that our prior decision established that the November 3 agreement between Vogel and Dowling (sic) controlled the sale price of the Property.

The principal factual issue the jury had to resolve was, in the language of the instruction, whether "the $1,200,000 sales price of the property was controlled by an agreement between the Defendants." Substantial evidence supports a jury verdict that it was not so controlled.

When the bankruptcy proceeding was begun, the debtor valued the Property at $1,200,000. The first offer made to the trustee was for $1,000,000; the trustee counter-offered to sell for $1,200,000. The trustee solicited other offers, and received

two, both for less than the first offer. Finally, Vogel offered the trustee $1,100,000. The owners of Landscape rejected that offer because they wanted $1,200,000, and Vogel ultimately signed the September 1, 1988 contract to purchase the Property at that price.

The $1,200,000 sales price was the amount that the owners of the business believed was the value of the Property and which they wanted to obtain for it. It provided enough to pay all the secured and unsecured creditors and to permit a substantial distribution to the owners.

This evidence provided an adequate basis for the jury to conclude that the sales price of the Property was controlled by the September 1, 1988 contract between Vogel and the trustee and not by the subsequent November 3 agreement between Vogel and Downing. Since the September 1 contract that set the price was between Vogel and the trustee, the jury properly could have concluded that the sales price "had not been controlled by an agreement between the Defendants."

Vogel testified that the $350,000 payment to Downing (who represented Whisenhunt) under the November 3 agreement reflected

> that we're two businessmen who are functioning as businessmen who have a common interest to sit down and talk, to work out an arrangement that is done every day in business. We're not lawyers, we're not bankrupt people. We are opportunity people in building shopping centers, doing developments. We both had an idea of what we were going to do, and Mr. Whisenhunt and I in a friendly manner resolved a financial arrangement that we do in business, in our type of business every day, that we do development. I mean, it's business.

In denying Landscape's motion for a directed verdict, the district court correctly recognized that there was sufficient evidence to permit the jury to conclude that the November 3 contract did not control the sales price of the Property:

> Oh, I disagree with you. I think there's a lot of proof in the case that the agreement between Mr. Vogel and Mr. Whisenhunt had to do with the purchase of the contract right, for the assignment of that right, for getting -either getting rid of the other, and for the loss of business opportunity, and did not represent a sum of money that would otherwise have gone into the hands of the trustee.

CONCLUSION

The judgement of the district court is affirmed.

A true copy:

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 94-1234EALR

Landscape Properties, Inc., etc., Appellant,

v.

Robert A. Vogel, et al., Appellees.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 28, 1995

Order Entered at the Direction of the Court:
/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LANDSCAPE PROPERTIES, INC., Debtor in Possession — PLAINTIFF

vs. LR- C-90-680

ROBERT A. VOGEL and JOE D. WHISENHUNT — DEFENDANTS

ROBERT A VOGEL — DEFENDANT AND THIRD-PARTY PLAINTIFF

vs .

CHARLES DARWIN DAVIDSON AND DAVIDSON LAW FIRM — THIRD-PARTY DEFENDANTS

JUDGMENT

Pursuant to the jury's verdicts entered on December 17, 1993, Judgment is entered in favor of defendants Robert A. Vogel and Joe D. Whisenhunt on plaintiff's complaint and plaintiff's complaint is dismissed with prejudice.

The Court finds there is no just reason for delay in entering Judgment on plaintiff's claim against defendants pursuant to the jury's verdicts.

SO ORDERED this 29th day of December, 1993.

/s/ Stephen M. Reasoner
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RICHARD L. RAMSAY, TRUSTEE
PLAINTIFF

vs. LR-C-90-680

ROBERT A. VOGEL, RICHARD C. DOWNING, agent for Milton T. Schaeffer, RICHARD C. DOWNING, Attorney for Joe D. Whisenhunt, JOE D. WHISENHUNT and WINGFIELD MARTIN DEFENDANTS

ORDER

Pending before the Court is plaintiff's motion for leave to file an amended and substituted complaint (document =14).

Plaintiff originally filed this compiaint on May 23, 1989, pursuant to 11 U.S.C. § 363(n) seeking compensatory[1] and punitive damages plus attorney's fees, although 11 U.S.C. § 363(n) alternatively permits a trustee to seek avoidance of the sale. This court dismissed the action in October, 1991, but the dismissal was reversed and the case remanded on August 14, 1992. On August 18, 1992, plaintiff filed a Motion to File Amended and Substituted Complaint (document 414) to add three additional parties[2] and to seek, pursuant to section 363(n), the additional remedies of avoidance of the sale and an accounting.

---

[1]The difference between the fair market value of the property sold and the amount previously paid by Robert Vogel to the Trustee.

[2]Plaintiff seeks to add Twin City Bank, who allegedly has a mortgage on the property, and Kroger and Little Ceaser's who are alleged to be in possession of a portion of the property as tenants of Mr. Whisenhunt.

Defendants Robert Vogel and Richard C Downing object to the amendment for several reasons. First, defendants state that Plaintiff the remedy of damages in the original complaint filed May 23, 1989, and should not be able at this late date in the lawsuit to assert a claim for avoidance of the sale and an accounting which are remedies defendants state are inconsistent with a claim for damages. Secondly, defendants allege that rescission is not a proper remedy as plaintiff has acted in an untimely manner to seek this remedy. Defendants state that granting the Trustee permission to amend would unduly complicate the case and burden this proceeding with additional claims three years after the lawsuit was filed. It is also argued that innocent third parties would be affected by allowing the amendment. Thirdly, defendants claim that plaintiff fails to state a claim for rescission as he has failed to tender return of the money he received from the sale of the property, which defendants state is a prerequisite to a claim for rescission. Finally, defendants argue that the Trustee has expressly waived any claim of rescission in this case referring to Trustee's statement in his Motion to Strike Objection, filed February 6, 1990 in which he stated:

> Trustee admits that if he makes distributions contemplated by the subject Motion, he will be unable to effectuate such recession, however, states that recession is not a possibility under the circumstances of this case.

Plaintiff responds that he is not seeking rescission but avoidance of the sale as provided by the statute. Plaintiff admits that recession implies some duty to restore the other party to the position they were in prior to the sale but that the phrase "avoid a sale" has no such implication and that plaintiff is not required to return the parties to the status quo. It is argued that restoration of the status quo is required under the doctrine of rescission because the sale is considered voidable, as opposed to void, but that a sale that is "avoided" is void and does **not** require the repayment of the purchase price as a condition.

Section 363(n) provides:

> The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, *or* may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale *or* recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(emphasis added). It is readily apparent from a reading of the statute that the remedies provided are in the alternative and that a party must choose which remedy to pursue. The Trustee elected the remedy of damages in the original complaint and seeks three years later to elect the alternative remedy of avoidance, admittedly to seek a better recovery in the action. However, plaintiff offers no reason why he waited three years to seek amendment to the complaint when he acknowledges that in the interim, the property was sold, leased, developed and mortgaged. Clearly the opposing parties to this action, and the parties sought to be added, would be Prejudiced by the late amendment. Under the circumstances of this case, justice does not require leave of court to allow for the amendment. *See Foman v. Davis,* 371 U.S. 178 (1962).

It is, therefore, ORDERED that plaintiff's motion for leave to file an amended and substituted complaint document #14) is denied.

Dated this 2nd day of December, 1992.

/s/ Stephen M. Reasoner
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-3592EALR

Richard L. Ramsay, Trustee, Plaintiff-Appellant

v.

Robert A. Vogel, Richard C. Downing, agent for Milton T. Schaeffer, Richard C. Downing, Attorney for Joe D. Whisenhunt, Joe D. Whisenhunt and Wingfield Martin, Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Arkansas

Submitted: April 17, 1992
Filed: July 22, 1992

Before ARNOLD, Chief Judge, FRIEDMAN*, Senior Circuit Judge, and LOKEN, Circuit Judge.

FRIEDMAN Senior Circuit Judge.

Section 363(n) of the Bankruptcy Act permits a bankruptcy trustee to "avoid" a sale of the bankruptcy estate's property or to recover damages "if the sale price was controlled by an agreement among potential bidders at such sale." 11 U.S.C. § 363(n) (1988). The district court held that § 363(n) applies only to sales of property at public auction, and therefore dismissed a

*DANIEL M. FRIEDMAN, of the United States Court of Appeals for the Federal Circuit, sitting by designation.

bankruptcy trustee's complaint alleging that certain individuals agreed to control the price at which real estate was sold in a private sale. We hold that § 363(n) covers private sales, and therefore reverse.

I.

A. Landscape Properties, Inc. filed a petition under Chapter 7 of the Bankruptcy Act in June 1988. The appellant Ramsay is the trustee in bankruptcy. After the trustee, with the approval of the bankruptcy court, sold real property of the bankrupt in a private sale, the trustee filed a complaint in the bankruptcy court against four individuals involved in the sale. *The* bankruptcy court certified the case to the district court after the defendants demanded a jury trial. On the defendants' motion, the United States District Court for the Eastern District of Arkansas (Reasoner, J.) dismissed the complaint pursuant to Federal Rule of Civil Procedure 12 (b) (6).

The allegations in the complaint, which we accept in determining whether the complaint states a claim upon which relief may be granted, *Palmer v. Tracor,* 856 F.2d 1131, 1132 (8th Cir. 1988) are as follows:

In September 1988, the bankruptcy trustee entered into a contract with Robert A. Vogel for the sale of certain of the debtor's real estate to Vogel for $1,200,000. The debtor and Wingfield Martin filed objections with the bankruptcy court.

At a hearing on the objections, after the debtor withdrew its objection, Richard Downing, representing Joe D. Whisenhunt, offered $1,225,000. In light of this higher offer, the bankruptcy court declined to approve the sale, and continued the hearing to allow Vogel to submit further evidence in support of his contract with the trustee.

Prior to the reopened hearing, the trustee was notified that Martin would withdraw his objection, which he did on the day of the hearing. Downing also withdrew his $1,225,000 offer. At the reopened hearing, there was no objection to Vogel's

$1,200,000 offer. Shortly after the hearing, the bankruptcy court authorized the sale to Vogel, and the parties closed the sale in early 1989. The property was conveyed to Downing, to whom Vogel had assigned his rights under the contract.

After the closing, the trustee received a copy of an agreement between Vogel and Downing, dated one day before the reopened hearing, under which Vogel agreed to assign to Downing, at Downing's option, Vogel's rights in his September purchase contract (which permitted assignment). If Downing took the assignment, he would pay Vogel $350,000; if Downing did not exercise his option, Vogel would pay Downing $350,000. Vogel's assignment of the contract was conditioned upon Downing's withdrawal of his $1,225,000 offer and the bankruptcy court's approval of the underlying contract between the trustee and Vogel.

B. After learning of the Vogel-Downing agreement, the trustee filed suit in the bankruptcy court against Vogel, Downing; Whisenhunt and Martin. The defendants demanded a jury trial and the bankruptcy court certified the case to the district court.

The complaint alleged that Vogel, Downing, Whisenhunt, and Martin were parties to a collusive agreement to control the sale price of bankruptcy estate property, which deprived the estate of at least $350,000, "in willful disregard of the rights of the estate and the provisions of 11 U.S.C. 363(n)." The trustee sought a determination of the fair market value of the property, compensatory damages of at least $350,000 and punitive damages of $1,000,000.

The district court dismissed the complaint. The court stated that in light of the language of § 363(n), which covers "agreements among potential bidders at such sale," "[t]he issue for the Court's determination is whether the statute applies to a private sale, as opposed to a public auction, as the parties . . . agree that the agreement between the defendants was clearly negotiated at a private sale."

The court held:

> Clearly, the terms "bid" and "bidder" contemplate a public auction. Furthermore, the use of the phrase *"bidders at such sale,"* with the word "bidders" being plural, appears to contemplate a public gathering rather than a private sale as occurred in this case. Upon reviewing the language of the statute itself and the definitions of the terms, the Court finds the statute was intended to apply only to public auctions. As the undisputed facts in this case reveal a private sale, . . . plaintiff has failed to state a claim upon which relief can be granted.

(Emphasis in original.)

II.

1. Section 363 of the Bankruptcy Act is captioned "Use, Sale, or Lease of Property." Subsection (b) (l) provides:

> The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

Bankruptcy Rule 6004 (f) (1) provides that "[a]ll sales not in the ordinary course of business may be by private sale or by public auction."

Section 363(n) provides:

> The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such

> sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgement for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

The district court construed this provision as covering only bidders at a public auction sale. We conclude, however, that the statutory words "potential bidders at such sale" are not so limited. Rather, they cover all persons who are contemplating making an offer to purchase property of a bankrupt estate that the trustee seeks to sell, whether such sale be private or at public auction.

Under § 363(b) and the implementing bankruptcy rule, the trustee may sell property of a bankrupt estate through either a private sale or a public auction. Section 363(n) authorizes the trustee to "avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale." The sale "under this section" that the trustee may avoid is one made pursuant to the trustee's power of sale under § 363(b). Under Bankruptcy Rule 6004 (f) (1) such a sale may be "by private sale or by public auction." The words in § 363(n) "bidders at such sale" cannot properly be read to limit the trustee's authority to avoid sales of a bankrupt estate's property resulting from price collusion among potential purchasers of the property to situations where the collusion occurs only in connection with a public auction sale.

The injury that such collusion inflicts upon the bankrupt estate -- denying it, and therefore the bankrupt's creditors, the full value of the property in the estate -- is the same whether the collusion occurs in connection with a private sale or a public auction. In this case, for example, the effect of the collusion alleged in the trustee's complaint was to produce for the bankrupt estate an amount that was at least $350,000 less than the

fair market value of the property. The result of the Vogel-Downing agreement was that although the property cost Downing $350,000 more than the $1,200,000 for which the trustee sold it, the additional amount went not to the bankrupt estate but to another potential purchaser of the property. Not surprisingly, at oral argument the appellees' counsel stated that if the facts regarding the Vogel Downing agreement had been disclosed to the bankruptcy court, that court undoubtedly would not have approved the sale at $1,200,000.

The collusion among prospective purchasers that the trustee's complaint alleges is precisely the evil Congress intended to deal with in § 363(n). Both the House and Senate committee reports stated that § 363(n) "is directed at collusive bidding on property sold under this section. It permits the trustee to void a sale if the price of the sale was controlled by an agreement among potential bidders." H.R. Rep. No. 95-595, 95th Cong., 2nd Sess., at 346 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6302; S. Rep. No. 95989, 95th Cong., 2nd Sess., at 57, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5843. There is nothing in the legislative history of § 363(n) that indicates, or even suggests, that Congress intended to limit the trustee's authority under that section to sales of the bankrupt property at public auctions. Indeed, in view of the purpose of that section, it would have been surprising if Congress had so limited it.

The district court relied heavily on the definitions in *Black's Law Dictionary* (5th Ed., West 1979) of "bidder" as:

> One who makes a bid. One who offers to pay a specified price for an article offered for sale at a public auction a certain contract for a specified price,

and of "bid" as, "An offer by an intending purchaser to pay a designated price for property which is about to be sold at auction." Other dictionary definitions of those terms, however, are not that restricted. For example, one of the definitions of the verb "bid" in *Webster's Third New International Dictionary*

(1966), page 212, is "to state what one will pay or take," and one of the noun "bid" is "an offer of a price (as at an auction)." Similarly, *Webster's Ninth New Collegiate Dictionary* (1990), page 148, defines the verb "bid" as "to offer (a price) whether for payment or acceptance," and the noun "bid" as "a statement of what one will give or take for something; *esp:* an offer of price." Thus, the common meaning of the word "bidder" is not limited to one who makes an offer to purchase at a public auction sale.

In other situations, the words "bid" and "bidder" commonly are used to refer to the making of an offer to buy or sell property or to provide services in a private sale or transaction. In federal government contracting, for example, persons responding to a government request for proposals are known as "bidders." The "bids" are opened at a specified time, and the person who is awarded the contract is the successful "bidder." *See. e.g., Andersen Consulting v. United States*, 959 F.2d 929 (Fed. Cir. 1992); *Lear Siegler Mgmt. Serv. Corp. v. United States,* 867 F.2d 600 (Fed. Cir. 1989); *see generally* 1 Ralph C. Nash, Jr. & John Cibinic, Jr., *Federal Procurement Law,* ch. 3 (3rd ed. 1977). There is no public auction, and the transaction is a private one. Similarly, "bid-rigging," in which prospective sellers or purchasers in a private transaction agree upon the price they will offer, is a form of price-fixing that violates section 1 of the Sherman Antitrust Act. *See e.g.., United States v. MMR Corp.*, 907 F.2d 489 (5th Cir. 1990); *see also City Capital Assoc. Ltd. v. Interco Inc.,* 860 F.2d 60, 64 (3rd Cir. 1988) (under Williams Act and its implementing regulations, a "bidder" is "the person or entity that will purchase the securities tendered").

We think Congress used the phrase "potential bidders at such sale" as a shorthand way of including all persons who might make an offer for estate property that the trustee is selling. Contrary to the district court's view that Congress's use of the plural "bidders" "appears to contemplate a public gathering

rather than a private sale, "the use of the plural was necessary simply because an agreement among prospective purchasers involves more than one person.

III

Although we hold that the district court's dismissal of the complaint as not stating a claim under § 363(n) cannot stand, we nevertheless affirm the dismissal of the complaint against the appellee Martin.

Section 363(n) deals with an "agreement among potential bidders" that "controls" the sale price. The only agreement that the trustee's complaint alleged involved such a collusive sale was the Vogel-Downing agreement, pursuant to which Downing undertook to pay Vogel $350,000 in return for Vogel's assigning to Downing his contractual right to purchase the property for $1,200,000. The only parties to that agreement were Vogel and Downing. The sole reference to Martin in the agreement was that Downing and Whisenhunt (for whom Downing signed the agreement as attorney) would indemnify Vogel from claims by Martin "arising out of the Vogel or Downing offers."

Moreover, although Martin initially objected before the bankruptcy court to the trustee's proposed sale the Vogel for $1,200,000 (an objection he subsequently withdrew), the complaint does not content that Martin was a potential bidder for the property. The complaint alleges only that the Vogel-Downing agreement "contemplates the withdrawal of the Wingfield Martin objection to the $1,200,000.00 sale to Vogel, " that Martin "withdrew his objection to sale in order to allow the Vogel contract to be approved in futherance of the collusion by and between the other defendants," and that "[t]he actions by the separate defendant Wingfield Martin make him a party to the collusion."

The allegations in the complaint, as supplemented by the text of the Vogel-Downing agreement, do not state a claim against Martin under § 363(n).

IV.

The trustee further contends that, in addition to the claims under § 363(n), his complaint also alleged state common law claims of civil conspiracy and fraud and that the district court erroneously denied those claims. Although the complaint does not contain separate counts for conspiracy and fraud, the trustee contends that :"[t]he complaint alleged facts with specificity sufficient to apprise the Appellees of the relief sought" and that the district court erred in not addressing those allegations.

We disagree. The complaint alleges collusion among bidders at a bankruptcy sale in violation of § 363(n). There are no separate counts or even allegations of common law conspiracy or fraud. The trustee did not raise these claims at the hearing on the appellees' motion to dismiss.

Fairly read, the complaint did not allege common law claims or conspiracy or fraud. The mere presence of the words "conspired" and "collusion" in the complaint were insufficient to constitute an allegation of such common law claims. The district court cannot be faulted for failing to discuss claims that the complaint did not fairly raise and that the trustee did not discuss at the hearing. As the court stated, "I am going to make a decision whether as a matter of law section (n) covers a private sale.... I am going to look at this case very narrowly and that's just the interpretation of the statute." Even then the trustee did not allude to the alleged common law claims.

On the remand we order, the trustee may, of course, move to amend his complaint as he deems appropriate, including the addition of common law claims. The decision whether to permit such amendment lies primarily within the district court's discretion. *Weimer v. Amen*, 870 F.2d 1400, 1406 (8th Cir. 1989). As it now stands, however, the complaint states only a claim under § 363 (n) of the Bankruptcy Act.

The order of the district court is reversed insofar as it dis-

missed the complaint against Vogel, Downing and Whisenhunt for failure to state a claim under § 363 (n), and affirmed insofar as it dismissed the complaint against Martin. The case is remanded to the district court for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RICHARD L. RAMSAY, TRUSTEE — PLAINTIFF

vs. LR-C-90-680

ROBERT A. VOGEL, RICHARD C. DOWNING, agent for Milton T. Schaeffer, RICHARD C. DOWNING, Attorney for Joe D. Whisenhunt, JOE D. WHISENHUNT and WINGFIELD MART I N — DEFENDANTS

ORDER

Plaintiff filed his complaint in the bankruptcy court. Defendants demanded a jury trial and the district court, by Order dated September 25, 1990, directed the case be assigned a civil case number and be scheduled for jury trial before the district court.

Plaintiff, as trustee, brings this action alleging that defendants agreed to illegally control the purchase price of certain property thereby depriving the estate and equity security holders of at least $350,000.00. Plaintiff claims that the conduct; of defendants was in willful disregard of the rights of the estate and brings this action against defendants pursuant to the provisions of 11 U.S.C. §363(n). Several, defendants moved to dismiss the complaint alleging that 11 U.S.C. §363(n) is inapplicable to the facts in this case.

The bankruptcy code provision on which plaintiff relies, 11 U.S.C. § 363(n), provides in pertinent part:

> The trustee may avoid a sale under this section if the sale price was controlled by an agreement

> among potential bidders at such sale, or may recover from a party to such agreement ...

(emphasis added). All parties agree that the Court must look to the language of the statute itself as the case law interpreting this section is scarce. The issue for the Court's determination is whether the statute applies to a private sale, as opposed to a public auction, as the parties also agree that the agreement between the defendants was clearly negotiated at a private sale. The terms "bidder" or "bid" are not defined in 11 U.S.C. §363(n). Black's Law Dictionary (5th Ed., West 1979) defines a "bidder" as:

> One who makes a bid. One who offers to pay a specified price for an article offered for sale at a public auction or to perform a certain contract for a specified price.

Black's further defines "bid" as, "An offer by an intending purchaser to pay a designated price for property *which* is about to be sold at auction." Clearly, the terms "bid" and "bidder" contemplate a public auction. Furthermore, the use of the phrase "bidders at such sale", with the word "bidders" being plural, appears to contemplate a public gathering rather than a private sale as occurred in this case. Upon reviewing the language of the statute itself and the definitions of the terms, the Court finds the statute was intended to apply only to public auctions. As the undisputed facts in this case reveal a private sale, 11 U.S.C. §363(n) is applicable and plaintiff has failed to state a claim upon which relief can be granted.

It is, therefore, ORDERED that the motions to dismiss filed by defendants Vogel, Martin and Whisenhunt are granted. All other pending motions in this case are rendered moot by the entry of this Order.

Dated this 9th day of October, 1991.

/s/ Stephen M. Reasoner
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RICHARD L. RAMSAY, TRUSTEE PLAINTIFF

VS. NO. LR-C-90-680

ROBERT A. VOGEL, RICHARD C. DOWNING, Agent for Milton T. Schaeffer, RICHARD C. DOWNNING [sic], Attorney for Joe D. Whisenhunt, JOE D. WHISENHUNT AND WINGFIELD MARTIN DEFENDANTS

ORDER

For the reasons stated in the Court's Order of October 9, 1991, it is ORDERED that the First Affirmative Defense asserted in the Answer filed by defendant Richard C. Downing, Agent for Milton T. Schaeffer, and Richard C. Downing, Attorney for Joe D. Whisenhunt, be granted, and this action is dismissed as to him.

DATED this 16th day of October, 1991.

/s/ Stephen W. Reasoner
U. S. DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

IN RE: LANDSCAPE PROPERTIES, INC. LR 88-908 S

Now before the court for review in Trustee's Proposed Sale of Real Property owned by the Chapter 7 debtor corporation. Two objections were filed. One objection to the Private Sale filed by the debtor, however, was withdrawn as satisfied. The second Objection to Proposed sale was filed by R. Wingfield Martin. A subsequent Amended Objection was also filed. These matters came before the Court for hearing October 27, 1988. The debtor appeared by counsel, C. Richard Crockett, Esq. The Trustee appeared *pro se*. R. Wingfield Martin appeared by counsel, David Grace, Esq. The following parties also entered appearance by counsel at the hearing in this matter: Richard Taylor. Esq. for First Pyramid Life Insurance; Geoffrey Treece, Esq. for Joe Wisenhunt; [sic], Eugene Fitzhugh, Esq. for Callie Henigan; and, Charles Darwin Davidson, Esq. for Robert Vogel, the purchaser under the Trustee's proposed sale now before the Court.

During the hearing the trustee announced that terms of the proposed sale, evidenced by an attachment to his Notice in this matter, would be amended to remove certain conditions, specifically the financing condition and the feasibility study condition. Additionally, the Trustee announced that the seven percent (7%) real estate commission provided for in the proposed sale would be waved.

The objection filed by Mr. Martin was to the effect that a higher offer had been presented to the Trustee. Although the two offers were for the same purchase price of $1,200,000.00, he contended that the second offer submitted to the Trustee was the higher and the better one because it was not encumbered with any conditions and the net amount to the estate would

not be reduced by the $84,000.00 real estate commission. The Trustee noted that since the conditions had been removed and the commission waived, the two offers for $1,200,000.00 were essentially identical but that he felt that the first offer and the one he was proposing to the Court was the best offer. Trustee offered no evidence other than his own comments.

Testimony and evidence presented at the hearing by the objector revealed that the two offers were essentially identical in wording. The second offer, however, did not contain certain limiting conditions or the provision for the seven percent (7%) real estate commission, all subsequently orally amended out of the first offer. At the hearing, however, an additional amendment to the second offer was presented by the agent for the purchaser raising the offer on the subject property to $1/225,000.00.

The Court found at the close of the hearing that the Trustee's sale for the lower amount could not be approved. The Court took into account the following in holding that the Trustee's sale could not be approved because there WAS a higher offer for- the estate property.

Section 363(b) of Title 11 provides, in pertinent part, that "the trustee, after notice and a hearing, may sell, other than in the ordinary course of business, property of the estate." In enacting the Bankruptcy Code, Congress expressed it's specific intent that judges of the United States Bankruptcy Court should not participate in the administration of bankruptcy estates. *In Re Nepsco, Inc.* 36 B.R. 25 (Bkrtcy. 1983). The intent of Congress is clearly set out in the legislative history of the Bankruptcy Code. H.R. No. 595, 95th Cong. 1st Sess.; pp. 3-4, 99-115 U.S. Code Cong. & Admin. News 1978 p. 5787. At page 113, that House Report points out that as early as 1792, in *United States v. Ferreira,* 54 U.S. (14 Howard) 40, 14 L. Ed. 42, the Supreme Court enunciated the principal that courts of the United States may not be invested with administrative functions - they may only decide cases or controversies. In abolishing the sys-

tem of referees in bankruptcy and then creating the bankruptcy court system Congress also created an expanded trustee's system. The trustee is invested with administrative powers formally the province of the referees in bankruptcy.

In the instant case a competing bid for the debtor's property was presented to the Court as support for a request that the Trustee's proposed sale be disallowed. The Court believes that it cannot choose between two competing bidders because to do so would be to undertake a congressionally prohibited administrative function. Such an action is beyond the jurisdictional mandate of Congress to bankruptcy courts and judges and may be subject to reversal on appellate review. *In Re Russo,* 762 F.2d 239 (2nd Cir. 1985). In deciding whether to approve a purchase offer or in choosing which is the better offer when competing offers have been made, courts generally consider factors in addition to a higher dollar amount. It has been held, however, that in a liquidation case it is "legally essential" to approve the highest offer, although this statement assumes that the offers and offerors are in all other respects comparable. In *Re Flannery,* 11 B.R. 974, 977 (Bkrtcy. E.D. Penn. 1981).

The Court then can do no more than disapprove the Trustee's proposed sale if it believes that there is a higher offer and better offer for the estate's assets. The quandary in which this estate now finds itself is not one of its own making but rather the creation of two competing interests. It is clear that the Court has no authority to designate a buyer from among several competing interests. There is a strong policy favoring competitive bidding and finality to sales in bankruptcy proceedings. *In Re Dartmouth Audio Inc.,* 42 B.R. 871 *(Bkrtcy.* D.N.H. 1984). It may be that the only avenue available to the Trustee which would accommodate all the concerns and which will accord the fullest possible measure of fairness and finality is by way of a public auction. *Matter or Ohio Corrugating Co.,* 59 B.R. 11 (Bkrtcy. N.D. Ohio 1985).

Although both of the competing offers to the Trustee are

denominated "real estate contract" there simply is no contract without bankruptcy coup approval. Both "contracts" do note that no sale would be final without the bankruptcy court's approval. Additionally, the Court would note that although potential purchasers may object to the Trustee's shopping a private offer of sale around in an effort to obtain a higher offer on the same terms, this natural desire of a potential purchaser clearly conflicts with the fact that interested parties in bankruptcy proceedings are entitled to full disclosure of the proposed terms of sale and agreements and should not be denied access. Therefore, the very situation that occurred at the hearing on this matter is not unusual and is one of the possibilities that could occur in the case of a private sale of assets of the estate. Interested parties simply can see that a particular asset will be sold for a sum certain. They or someone they know may be willing to pay more money on the same terms. An objection to a sale based simply on the fact that there is a higher offer is a valid objection to sale and one the Court believes it must sustain under certain circumstances. *In Re Flannery,* 11 B.R. 974, 977 (Bkrtcy. E D. Penn. 1981).

The Court for the following reason, however, has decided to reconsider its decision to disapprove the sale to Mr. Vogel. During the proceedings the Court did not recognize the attorney for the potential purchaser under the Trustee's proposed sale as representing a party-in-interest to the proceedings. The Trustee declined to permit the purchaser's attorney to present the purchaser's case for him. Even though the Court Recognizes that the Trustee may decline this assistance, it does feel that it would be more equitable to allow the purchaser to establish at the hearing its own offer in addition to its business and financial ability to perform pursuant to that offer. Although Mr. Vogel is obviously not making the highest offer on the property, it may be the better offer for reasons wholly undisclosed to the Court at the time of the hearing. The Court finds that its earlier ruling from the bench should be set aside and the hear-

ing on the proposed sale continued for the purposes hereinabove set out.

Accordingly, it is hereby

ORDERED that a hearing be held on November 4, 1988 at 1:30 p.m. at the U.S Post Office and Courthouse, 600 W. Capitol, Little Rock, Arkansas for the purpose of permitting the purchaser under the Trustee's pending proposed sale to present its case with regard to the $1,200,000.00 offer it has made to the Trustee for assets of the bankruptcy estate.

IT IS SO ORDERED.

/s/ Mary Davis Scott
HONORABLE MARY DAVIES SCOTT
UNITED STATES BANKRUPTCY JUDGE

DATE: October 31, 1988

CC: C. Richard Crockett, Esq., P.O. Box 3773, Little Rock, AR 72203 Richard Ramsay, Trustee, P.O. Box 8509, Pine Bluff, AR 71611 Charles Darwin Davidson, Esq., P.O. Box 1300, Little Rock, AR 72203 David Grace, Esq., 410 W. 3rd Street, Little Rock, AR 72201 Geoffrey Treece, Esq., 1910 First Commercial Bldg. Little Rock, AR 72201 Sam Ledbetter, Esq., First Federal Plaza, Suite 503, Little Rock, AR 72201 Richard Taylor, Esq., 2000 First Commercial Bldg., Little Rock, AR 72201 Eugene Fitzhugh, Esq., 7200 Geyer Springs Road, Little Rock, AR 72201 U.S. Trustee

§ 363. Use, sale or lease of property.

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended—

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section;or

(iii) by the court after notice and a hearing.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter

into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood What the trustee will prevail at the final hearing under subsection (e) of this ;section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, r control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362(c), 362(d), 362(e), or 362(f) of this title.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of per-

sonal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection *(f)* of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natu-

ral or synthetic gas for heat, light, or power.

(i) Before the consummation *of* a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12 or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under

such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) In any hearing under this section—

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2572; Pub.L. 98-353, Title III, § 442, July 10, 1984, 98 Stat. 371; Pub.L. 99-554, Title II, § 257(k), Oct. 27, 1986, 100 Stat. 3115; Pub.L. 103-394, §§ 109, 214(b), 219(c), 501(d)(8), October 22, 1994, 108 Stat. 4106.

Supreme Court, U.S.
FILED
JUL 25 1995
CLERK

(2)

No. 94-2116

In The

Supreme Court of the United States

October Term, 1995

LANDSCAPE PROPERTIES, INC.,
Debtor In Possession,

Petitioner,

v.

ROBERT A. VOGEL and JOE D. WHISENHUNT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN C. CALHOUN, JR., Esq.*
SCOTT E. DANIEL, Esq.
HILBURN, CALHOON, HARPER, PRUNISKI & CALHOUN, LTD.
P. O. Box 5551
North Little Rock, Arkansas 72119
(501) 372-0110

Attorneys for Respondent Robert A. Vogel

*Counsel of Record

G. PATRICK ARNOULT, Esq.
RUSSELL J. HENSLEY, Esq.
THE BOGATIN LAW FIRM
860 Ridge Lake Boulevard
Suite 360
Memphis, Tennessee 38120
(901) 767-1234

Attorneys for Respondent Joe D. Whisenhunt

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

23pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 2

I. Enactment of 11 U.S.C. § 363(n) did not Eliminate Defenses 2

II. Election of Remedies is not an Issue 9

III. The Case was Properly Submitted to the Jury 13

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Astoria Federal Savings and Loan Association v. Solimino, 501 U.S. 104 (1991) 8

BFP v. Resolution Trust Corp., 114 S. Ct. 1757 (1994) 8

Curtis v. Loether, 415 U.S. 189 (1974) 15

Davis v. Wakelee, 156 U.S. 680 (1895) 12

Fleck v. KDI Sylvan Pools, Inc., 981 F.2d 107 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1645 (1993) 12

General Talking Pictures Corp. v. Western Elec. Co., 304 U.S. 175 (1938) 17

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989)... 14, 15

Grogan v. Garner, 806 F.2d 829 (8th Cir. 1986) 12

Gumport v. China Int'l Trust & Inv. Corp. (In re Intermagnetics America, Inc.), 926 F.2d 912 (9th Cir. 1991) 6

Harris Trust and Savings Bank v. E-II Holdings, Inc., 926 F.2d 636 (7th Cir. 1991), *cert. denied*, 502 U.S. 866 (1991) 12

In re Davis, 109 B.R. 633 (Bankr. D. Vt. 1989)..... 5

Landscape Properties, Inc. v. Vogel, 46 F.3d 1416 (8th Cir. 1995) 1

Ledford v. Second Nat'l Bank (In re Becker), 76 B.R. 108 (Bankr. S.D. Ohio 1986)..... 5

Markman v. Westview Instruments, Inc., 52 F.3d 967 (Fed. Cir. 1995)..... 16

TABLE OF AUTHORITIES – Continued

Page

Metsch v. Republic Nat'l Bank (In re Colombian Coffee Co., Inc.), 66 B.R. 211 (Bankr. S.D. Fla. 1986) 5

Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection, 474 U.S. 494 (1986) 9

Murray v. Silberstein, 882 F.2d 61 (3d Cir. 1989) 12

Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208 (1st Cir. 1987) 12

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 10

Robertson v. Isomedix, Inc. (In re Int'l Nutronics, Inc.), 3 F.3d 306 (9th Cir. 1993) 6, 7

Robertson v. Isomedix, Inc. (In re Int'l Nutronics, Inc.), 28 F.3d 965 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 577 (1994) 7

Texas v. Mead, 465 U.S. 1041 (1984) 17

Tull v. United States, 481 U.S. 412 (1987) 16

United States v. Texas, 113 S. Ct. 1631 (1993) 8

United States v. Johnston, 268 U.S. 220 (1925) 17

United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989) 9

United States v. Smith (In re Hagendorfer), 803 F.2d 647 (11th Cir. 1986) 6

Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156 (1946) 8

STATUTE

11 U.S.C. § 363(n) 2

TABLE OF AUTHORITIES – Continued

Page

RULES

Fed. R. Civ. P. Rule 60 6

Sup. Ct. R. 10.1 2

OTHER AUTHORITY

Stern & Gressman, *Supreme Court Practice* § 14.4 (7th ed. 1993) 2

STATEMENT OF THE CASE

Petitioner fails to include in its Statement of the Case numerous salient aspects of this litigation. Fortunately for this record, the opinion of the Eighth Circuit Court of Appeals was required to be included in the appendix (Pet. p. 3A), and it does present the facts in appropriate context. *Landscape Properties, Inc. v. Vogel*, 46 F.3d 1416 (8th Cir. 1995).

Petitioner omits to explain, for example, the entire history of the process by which its own shareholders and the Trustee combined to establish the ultimate selling price of the subject property more than two months prior to any agreement between Respondents, a price which paid all creditors in full and yielded net proceeds to the shareholders. It omits to explain how the efforts of Vogel, in reliance upon the contract with the Trustee, created the value for which he was paid by Whisenhunt. It omits to explain that the Trustee himself prepared the deed to the property, reciting the direct conveyance to Whisenhunt's nominee by reason of the assignment from his alleged competitor.

Petitioner neglects to inform this Court that the Trustee sued only for damages, after obtaining a copy of the challenged agreement, or that the Trustee specifically waived any claim to rescind the transaction in order to distribute the Whisenhunt purchase price to the creditors, Petitioner's counsel, Petitioner's sole shareholders and to himself.

Petitioner devotes a major portion of its argument to the claim that Respondents were not entitled to a jury trial. Astonishingly, however, the Petitioner fails to

inform this Court that its counsel made, and admitted on the record, a conscious and calculated tactical decision to *agree* to a jury trial to avoid error and preserve the favorable verdict it was so confident of obtaining.

Unfortunately, moreover, the Petitioner's characterization of the legal issues presented is no more straightforward than its statement of facts.

REASONS FOR DENYING THE PETITION

This Court doubtless receives hundreds, if not thousands, of petitions each year with no more basis than failed expectations and keen disappointment. This is another one.

After one cuts through the transparent effort of Petitioner to cloak its arguments in the trappings of constitutional law and statutory construction, it is clear that this case presents no more novel issues than arguments about the sufficiency of the evidence and the exercise of discretion by the District Court in denying the Petitioner's untimely and prejudicial proposed amendment to the complaint. Such matters are not appropriate for consideration through Writ of Certiorari. Sup. Ct. R. 10.1; Stern & Gressman, *Supreme Court Practice* § 14.4 (7th ed. 1993).

I. Enactment of 11 U.S.C. § 363(n) did not Eliminate Defenses.

In 1988, Landscape Properties, Inc. was a company in bankruptcy which had, among its various assets, a piece of undeveloped real property located on the outskirts of

Little Rock, Arkansas. During the summer of 1988, the bankruptcy Trustee conducted competitive pricing among all interested parties. At the outset of the sales effort, the Trustee and the debtor set their target price at $1.2 million, which was the value sworn to by the shareholders in the Schedules filed under oath in the bankruptcy action. That was the debtor's and the Trustee's price and on September 1, 1988, Vogel executed a contract agreeing to pay it. That was the price ultimately paid to the Trustee by Whisenhunt after the Vogel Contract was assigned to him.

The jury was entitled to consider the fact that the Petitioner's sole shareholders themselves were pleased with the September 1, 1988 Contract and Vogel's commitment to pay their asking price. This was not surprising since the Petitioner's shareholders needed the money to pay the Internal Revenue Service to cover their personal liability for withholding taxes diverted by them to their own use, as well as for payment of all creditors of the company to allow retention of other real estate not involved in this sale. With the Vogel contract in hand, the Petitioner's shareholders were able to hold off the tax collector and forestall foreclosure by the mortgagee who was seeking to be paid.[1]

The Vogel Contract was the only agreement capable of being approved since any other offer would require an additional notice and hearing process of the sort that had already delayed the sale for two months. Even then, there could be another offer at the next hearing and the process

---

[1] The two shareholders of Landscape Properties, Inc. sought bankruptcy protection to avoid liability for the unpaid withholding taxes.

could continue indefinitely, thereby delaying access to the sale proceeds so badly needed by the shareholders and the Trustee. The Trustee and the Petitioner's shareholders only wanted Vogel and Whisenhunt to resolve their dispute so they could conclude this sale at the price agreed upon. They were not interested in what it took to obtain that resolution and avoided finding out anything about the arrangement.

Petitioner complains that the Respondents should not have been allowed to have the jury instructed on issues of waiver and estoppel. Those defenses were pertinent in view of the substantial evidence that the Trustee himself had ample reason to know that the Respondents had made an agreement to resolve their dispute and move the sale to a conclusion. Indeed, notwithstanding the fact that the Trustee contracted to sell this property to Vogel, the Trustee himself deeded the property to Whisenhunt's nominee by virtue of a recited assignment from Vogel. This knowledge, the actions which followed the closing of the transaction, and the ultimate distribution of funds form the basis for the waiver and estoppel defenses upon which the jury was properly instructed.

There was ample evidence to warrant the jury's consideration of the waiver and estoppel defense. Moreover, the Petitioner interposed no objection to the substance of the instruction or to the inclusion of the language concerning the Trustee's duty to inquire into matters about which he had knowledge.[2]

---

[2] The statement by Petitioner (Pet. p. 8) that any lack of diligence by the Trustee should not be imputed to a successor

As with the issues already discussed, there was also no objection at trial to the instruction on assignability, which was also pertinent under the facts of this case. The Petitioner's only objection on any of these points was that there could be no defense at all to an action under 11 U.S.C. § 363(n). No authority for such a startling proposition was offered to the District Court or the Court of Appeals, and Petitioner concedes here that there is none.

The absence of authority for Petitioner's argument, however, does not make the issue one of first impression. Trustees in bankruptcy have repeatedly been barred from recovery because of their own knowledge or conduct. *See, e.g., In re Davis*, 109 B.R. 633 (Bankr. D. Vt. 1989); *Ledford v. Second Nat'l Bank (In re Becker)*, 76 B.R. 108 (Bankr. S.D. Ohio 1986); and *Metsch v. Republic Nat'l Bank (In re Colombian Coffee Co., Inc.)*, 66 B.R. 211 (Bankr. S.D. Fla. 1986). In the first of those cases, summary judgment was granted against a trustee seeking turnover of property because of his knowledge of facts sufficient to put him on inquiry

---

trustee is nothing short of astounding and illustrates the difficulty of responding to Petitioner's scatter-shot brief. On the eve of trial, Petitioner tried to distance itself from the acts of the Trustee by converting the underlying bankruptcy case to a Chapter 11 case and substituting the debtor in possession for the Trustee as plaintiff at trial. Before permitting the substitution, the District Court obtained the absolute and unqualified agreement of counsel for Petitioner that the Petitioner and the Trustee were one and the same for the trial of this case. The trial record is replete with discussions of that point, and the Eighth Circuit specifically quoted part of it in rejecting Petitioner's attempt to back up on that agreement. (Pet. p. 19A.) For Petitioner to again claim a distinction between it and the Trustee in this case is unseemly at best.

and charging him with actual notice of the facts which existed. *See also United States v. Smith (In re Hagendorfer)*, 803 F.2d 647 (11th Cir. 1986).

The cases cited by Petitioner as allegedly establishing conflict between circuits are wholly inapposite. *Gumport v. China Int'l Trust & Inv. Corp. (In re Intermagnetics America, Inc.)*, 926 F.2d 912 (9th Cir. 1991), simply involved a debtor in possession (equivalent to a trustee) who was himself an active party to a conspiracy to defraud the estate. There he kept secret a $16,000,000 offer from a third party, formed a dummy corporation to buy the property for $6,000,000, and gave the ultimate buyer a five percent discount on its price not to bid. Obviously, the debtor could not argue that he was insulated from his own wrongdoing, and estoppel was not even an issue in the case.

No more helpful to Petitioner, but actually supportive of the position of Respondents, is *Robertson v. Isomedix, Inc. (In re Int'l Nutronics, Inc.)*, 3 F.3d 306 (9th Cir. 1993). After one bidder there offered $600,000 for the product, the other offered "102%" of that bid ($612,000), and the trustee rejected both. Then, to the knowledge of the trustee, those two bidders combined and offered $364,000 for the same product, which the trustee accepted. Thus, the trustee received forty percent less than the earlier bid due to the combination, and he sued alleging violations of Section 363(n) and the Sherman Act.

In the original opinion cited by Petitioner, the Ninth Circuit refused to permit the Section 363(n) claim to be pursued because it was not filed within one year as required by Fed. R. Civ. P. Rule 60. It did, however, allow the Sherman Act claims to proceed, while it expressly

reserved ruling on the appellees' available affirmative defenses, *Robertson*, 3 F.3d at 311, which in view of that trustee's knowledge would obviously include estoppel. The ruling did not, therefore, indicate exemption of the trustee from that defense, but rather determined that it ***was*** available.

Upon rehearing, the Court of Appeals withdrew its earlier opinion and held that the Trustee's Sherman Act claims were barred by *res judicata*. *Robertson v. Isomedix, Inc.*, 28 F.3d 965 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 577 (1994). Thus, both the Section 363(n) and antitrust claims were dismissed. While the court did not find it necessary to opine again on the issue of available affirmative defenses, the rationale employed in its original opinion was not abandoned in its supplemental opinion and is presumably still sound today.

Petitioner's argument is that by enacting subsection (n) of Section 363 of the Bankruptcy Code relating to sales of property by trustees, Congress intended to abolish all defenses which might otherwise exist under applicable law. Acceptance of such a proposition would contravene well settled principles of statutory construction expressed by this Court. As recently as 1993, this Court stated:

> Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.

* * *

> In order to abrogate a common law principle, the statute must "speak directly" to the question addressed by the common law.

United States v. Texas, 113 S. Ct. 1631, 1634 (1993).

Similarly, the Court stated in *Astoria Federal Savings and Loan Association v. Solimino*, 501 U.S. 104, 108 (1991):

> The presumption holds nonetheless, for Congress is understood to legislate against a background of common-law adjudicatory principles. (citations omitted). Thus, where a common-law principle is well established . . . (citations omitted) the courts may take it as given that Congress has legislated with an expectation that the principle will apply except "when a statutory purpose to the contrary is evident." (citation omitted).

This sound principle has been specifically applied in connection with bankruptcy legislation. In *BFP v. Resolution Trust Corp.*, 114 S. Ct. 1757, 1765 (1994), this Court declined to find a Congressional intent to interfere with traditional law without a "clear and manifest" purpose to do so, "[o]therwise, the Bankruptcy Code will be construed to adopt, rather than to displace, pre-existing state law." (citations omitted). One of the authorities there cited was the statement of Mr. Justice Frankfurter, concurring in *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 171 (1946): "Bankruptcy legislation is superimposed upon rights and obligations created by the laws of the States."

Petitioner has the burden of demonstrating a clear Congressional purpose to exempt trustees from the consequences of their own knowledge and conduct, and it

has wholly failed to do so. The entire scheme of the Bankruptcy Code embodies the principle that a bankruptcy trustee "is not to have *carte blanche* to ignore nonbankruptcy law." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 244 (1989), (quoting *Midlantic, infra*). As stated by this Court in rejecting a similar argument to that here presented:

> If Congress wishes to grant the trustee an extraordinary exemption from nonbankruptcy law, "the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt."

Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection, 474 U.S. 494, 501 (1986).

II. Election of Remedies is not an Issue.

Petitioner either totally misses the point or dissembles in stating that the Eighth Circuit ruling below requires a trustee to elect at the time of filing suit whether to set aside the sale or sue for damages. (Pet. p. 7.) Neither the Eighth Circuit nor the District Court required any such thing.

In response to Petitioner's argument that the District Court abused its discretion in refusing to permit it to amend its 1989 damage complaint to assert the alternative remedy of avoidance more than three years later, the Eighth Circuit stated:

> We need not reach that question, however, because the jury's verdict in favor of the defendants, which we uphold in Part VI, makes that issue moot. (Pet. p. 13A.)

Petitioner refuses to come to grips with the fact that the jury found against it on the issue of liability. That being the case, it matters not what remedy Petitioner wished to seek. It lost the case on liability and, consequently, its entire discussion of the nature of its relief if it had won is totally academic. Such matters are insufficient to warrant the grant of certiorari. As stated by Mr. Justice Frankfurter in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955):

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (citations omitted). "Special and important reasons" imply a reach to a problem beyond the academic or the episodic.

In any event, the attempted amendment was properly denied. Three months after becoming aware of the agreement of which Petitioner complains, the Trustee sued for damages based on the alleged difference between the sale price and the fair market value of the property at the time of the sale. Less than eight months later, the Trustee moved to distribute the bulk of the net sale proceeds received from Whisenhunt.

The first mortgage had been paid as part of the closing, and on January 8, 1990, the Trustee sought permission to pay the claims of the general creditors, to pay legal fees, to pay the Internal Revenue Service (for which amount the two shareholders of Petitioner were personally liable), and to make partial distributions to those shareholders in the amount of $75,000 each. That total distribution would leave in the estate only slightly in excess of $280,000 from the $1.2 million paid for the property by Whisenhunt.

In response to Vogel's objection that the proposed distribution would prevent rescission of the sale to Whisenhunt, the Trustee stated that only he could seek such relief and, further:

> Trustee admits that if he makes distributions contemplated by the subject Motion, he will be unable to effectuate such recission, however, states that recission is not a possibility under the circumstances of this case.

The Trustee's motion was granted over the objection on March 9, 1990, and the distribution was made.

More than three years after filing the Complaint for damages and more than two years after admittedly rendering himself unable to rescind the sale, the Trustee moved to amend his Complaint. In the proposed amendment, he not only did seek to rescind the sale, but also proposed to add as new parties the mortgagee and tenants who had acquired interests in the property in the interim and to eject and dispossess them. The District Court quite properly rejected that inappropriate and

untimely attempt to escalate and unduly complicate the Trustee's existing straightforward suit for damages.

Contrary to Petitioner's representation here, nobody forced the Trustee to do anything. He voluntarily and for his own reasons made his election between inconsistent remedies. He could have been required to elect, *Grogan v. Garner*, 806 F.2d 829 (8th Cir. 1986), but was not. He sued only for money damages and that was his own election.

Furthermore, the Trustee specifically disclaimed any possibility of seeking to set aside the sale when he successfully pursued distribution of the sale proceeds to himself and the beneficial owners of Petitioner in 1990, expressly stating that such relief was "not a possibility under the circumstances of this case." As a consequence, he was barred by the principles of judicial estoppel from subsequently changing that position. As stated in *Davis v. Wakelee*, 156 U.S. 680, 689 (1895):

> It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

See also Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208 (1st Cir. 1987); *Murray v. Silberstein*, 882 F.2d 61 (3d Cir. 1989); *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 121 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1645 (1993); *Harris Trust and Savings Bank v. E-II Holdings, Inc.*, 926 F.2d 636, 641 (7th Cir. 1991), *cert. denied*, 502 U.S. 866 (1991).

The District Court summed up its reasons for denying the amendment as follows:

> The Trustee elected the remedy of damages in the original complaint and seeks three years later to elect the alternative remedy of avoidance, admittedly to seek a better recovery in the action. However, plaintiff offers no reason why he waited three years to seek amendment to the complaint when he acknowledges that in the interim, the property was sold, leased, developed and mortgaged. Clearly the opposing parties to this action, and the parties sought to be added, would be prejudiced by the late amendment. Under the circumstances of this case, justice does not require leave of court to allow for the amendment. *See Foman v. Davis*, 371 U.S. 178 (1962). (Pet. p. 27A.)

That ruling was as far from an abuse of discretion as imaginable, even if the entire issue were not mooted by the jury verdict.

III. The Case was Properly Submitted to the Jury.

This portion of the petition is the most disingenuous of all. Recognizing that its real goal of seeking further review of the jury's verdict would not likely be accomplished by presenting that issue in a straightforward manner, Petitioner attempts to bring the issue through the back door by phrasing it in terms of Seventh Amendment jury trial principles. There is no such dispute in this case, as the Eighth Circuit appropriately observed.

When this case was filed in the bankruptcy court, Respondents demanded a jury trial. The bankruptcy

judge found that "a bona fide jury trial issue exists" and certified the case to District Court for trial. The District Judge found that the defendants were entitled to a trial by jury on the basis of this Court's decision in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). At no time during those proceedings, nor any time prior to the jury verdict against it, did Petitioner object to or question the notion of resolving the issues in this case with a jury. In fact, Petitioner made a conscious, tactical decision to agree to a jury trial in order to avoid the possibility of error. As the Eighth Circuit properly held:

> At the pretrial hearing before the district court Mr. Brown, counsel for Landscape, apparently acquiesced in a jury trial. He stated:
>
> > MR. BROWN: If I may? That is a serious issue, because the right to trial by jury – this is strictly a statutory cause of action under 363(n). The right to trial by jury is really kind of iffy. We went along with it just because it seemed like if we do a jury, we don't have error, and if we don't do one, we might have error.
>
> In other words, to avoid any issue of possible error if there were a bench trial Landscape "went along with" the jury trial. Such acquiescence must be deemed a waiver of any objection to the jury trial. (Pet. p. 15A.)

That conclusion is eminently correct, and applies equally to Petitioner's failure to object to the submission to the jury of the Respondents' defenses. (Pet. p. 14.) The only objection ever made to jury consideration of any defenses was that none were possible. That issue has already been fully addressed.

In any event, there is no issue of substance regarding Respondents' right to a jury trial in this case. Petitioner is clearly wrong in suggesting that only common law claims implicate the right to jury trial. Numerous decisions of this Court squarely hold directly to the contrary. *See, e.g., Curtis v. Loether*, 415 U.S. 189, 193-96 (1974):

> Although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time.
>
> * * *
>
> Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.
>
> * * *
>
> As the Court of Appeals noted, this cause of action is analogous to a number of tort actions recognized at common law. More important, the relief sought here – actual and punitive damages – is the traditional form of relief offered in the courts of law.

Moreover, the claims here were not substantially different from those asserted in *Granfinanciera, supra,* where a trustee in bankruptcy sought money damages from an allegedly preferential transferee. The considerations there held to dictate a jury trial apply equally here.

Petitioner again tries to assert its avoidance theory as being inherently equitable. It has already been demonstrated that Petitioner does not ***have*** an avoidance remedy, but even if it did, that would not deprive Respondents of their right to trial by jury on the other issues in the case. As stated in *Tull v. United States*, 481 U.S. 412, 425 (1987):

> In such a situation, if a "legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact."

Neither can Petitioner be successful in seeking review of the jury verdict under the guise of claiming a conflict with decisions from other circuits due to the Eighth Circuit's standard of review. (Pet. p. 14.) There was no disputed issue of state law even involved in this case, and the Eighth Circuit certainly did not afford undue deference to the District Court's determination of any legal issue – state or federal. Even the principal decision relied upon by Petitioner in this regard readily recognized the deference to which jury verdicts are entitled. In *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 975 (Fed. Cir. 1995), the Court aptly observed:

> Factual findings made by the jury in arriving at its verdict are to be upheld unless the party moving for JMOL shows that (when the correct legal standard is applied) there is not substantial evidence to support a finding in favor of the nonmovant.

The Eighth Circuit clearly reached its own conclusion that:

> The principal factual issue the jury had to resolve was, in the language of the instruction, whether "the $1,200,000 sales price of the property was controlled by an agreement between the Defendants." Substantial evidence supports a jury verdict that it was not so controlled. (Pet. p. 20A.)

The fact that it agreed with the District Judge in this regard hardly means that the Court of Appeals abdicated its own responsibility.

CONCLUSION

Try as it may, Petitioner cannot put its square peg into any of the round holes constituting appropriate grounds for certiorari. In the final analysis its arguments are nothing more than disagreement with the jury verdict. This Court does not grant review to entertain such issues. *Texas v. Mead*, 465 U.S. 1041, 1043 (1984). *See also, General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938) ("Granting of [certiorari] would not be warranted merely to review the evidence or inferences drawn from it."); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts.")

Petitioner's claims were factually disputed, and the jury properly resolved all relevant issues. Petitioner has received appropriate judicial review at both the trial and

appellate court levels, and it is time to put an end to the ordeal of Respondents. The petition should be denied.

Respectfully submitted,

JOHN C. CALHOUN, JR., Esq.*
SCOTT E. DANIEL, Esq.
HILBURN, CALHOON, HARPER, PRUNISKI & CALHOUN, LTD.
P. O. Box 5551
North Little Rock, Arkansas 72119
(501) 372-0110

Attorneys for Respondent Robert A. Vogel

*Counsel of Record

G. PATRICK ARNOULT, ESQ.
RUSSELL J. HENSLEY, ESQ.
THE BOGATIN LAW FIRM
860 Ridge Lake Boulevard
Suite 360
Memphis, Tennessee 38120
(901) 767-1234

Attorneys for Respondent Joe D. Whisenhunt

(3)

Supreme Court, U.S.
FILED
AUG 11 1995
CLERK

No. 94-2116

IN THE

Supreme Court of the United States

October Term, 1994

Landscape Properties, Inc.
Debtor In Possession, *Petitioners*

v.

Robert A. Vogel and Joe D. Whisenhunt, *Respondents*

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

REPLY

C. Richard Crockett*
R.J. Brown
Crockett & Brown PLLC
10809 Executive Center Drive
Little Rock, Arkansas 72211
(501) 221-2939
Attorneys for Petitioner
Landscape Properties, Inc.
*Counsel of Record

PARAGON PRINTING & STA., 311 East Capitol Avenue, Little Rock, AR 72202 (501) 375-1281

BEST AVAILABLE COPY

5 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

ARGUMENT 1

CONCLUSION 3

No. 94-2116

IN THE

Supreme Court of the United States

October Term, 1994

Landscape Properties, Inc.
Debtor In Possession, *Petitioners*

v.

Robert A. Vogel and Joe D. Whisenhunt, *Respondents*

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

REPLY

ARGUMENT

Pursuant to Supreme Court rule 15.6, this Reply is limited to arguments perceived to be first raised in the brief in opposition.

Respondents argue that the Trustee and Petitioner's shareholders "only wanted Vogel and Whisenhunt to resolve their dispute so that they could conclude this sale at the price agreed upon", and that the motivation for such wish was to prevent a lengthy process of higher offers and hearings. (Res. Brf. 3-4).

Actually, it was Respondents who were "frustrated" by the bankruptcy sales process. The Trustee wanted the bidding war which was terminated by Respondent's Agreement.

Respondents argue impossibility as a defense to avoidance because the Trustee distributed proceeds of the sale to creditors. Respondents quote part of the Trustee's February 6, 1990, response to Vogel's objection to the distribution. (Res. Brf. 10-11).

In context, the Trustee alleged:

"7. Vogel further states that if his Motion to Dimiss is denied, he will seek recission of the real estate sale requiring the Trustee to pay separate Defendant Whisenhunt $1,200,000 in return for the subject real estate. Trustee admits that if he makes distributions contemplated by the subject Motion, he will be unable to effectuate such recission, however, states that recission is not a possibility under the circumstances of this case.

8. Pursuant to §363(n) of Code invoked by Trustee as the basis of the adversary proceeding filed herein, *only the Trustee may avoid a sale,* therefore, recission is not available to Defendant Vogel". *[sic]* (Emp. sup.)

Congress used the word "avoid" in 11 U.S. Code § 363(n), not the word "rescind". Avoiding the sale is not the same as rescission. Congress knows how to enact a rescissory remedy. *Randall v. Loftsgaarden,* 478 U.S. 647 (1986) (rev'g. 768 F.2d 949). After avoiding the sale, a trustee can sell the property at its higher true value.

Consequently, after avoiding the sale, a trustee will be able to refund the controlled price for the property, even if tender of the consideration at time of suit is not possible. The nature of the remedy of avoiding the sale provided by 11 U.S.C. § 363(n) should be first decided by this Court.

CONCLUSION

The court should issue a writ of Certiorari to the United States Court of Appeals for the Eight Circuit.

RESPECTFULLY SUBMITTED,

C. Richard Crockett*
R. J. Brown
Crockett & Brown PLLC
P.O. Box 24003
Little Rock, Arkansas 72221
(501) 221-2939
Attorney for Petitioner,
Landscape Properties, Inc.,
Debtor in Possession
*Counsel of Record